LIBRARY
SUPREME COURT U. S.

FILED
NOV 22 1967
JOHN F. DAVIS, CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, A.D. 1967.

No. 59

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC. AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents,

vs.

R. C. ENOS, Deputy Commissioner,

and

AGNES M. BANKS, widow of JOHN J. BANKS, deceased, and representative of JAMES M. BANKS, JANICE BANKS, and CATHERINE M. BANKS, minor children of JOHN J. BANKS, deceased,
Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 4, 1967.
CERTIORARI GRANTED OCTOBER 9, 1967.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1967.

No. 59

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC. AND NEW AMSTERDAM CASUALTY COMPANY,

Respondents,

vs.

R. C. ENOS, Deputy Commissioner,

and

AGNES M. BANKS, widow of JOHN J. BANKS, deceased, and representative of JAMES M. BANKS, JANICE BANKS, and CATHERINE M. BANKS, minor children of JOHN J. BANKS, deceased,

Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	PAGE
Prefix to Record Under Rule 12(c)	1
Placita	2
Complaint	2
Exhibit "B" to Complaint	10
Exhibit "C" to Complaint	11
Exhibit "C2" to Complaint	12
Exhibit "D" to Complaint	13

The Scheffer Press, Inc.—ANdover 3-6850

PAGE

Answer to Complaint 18

Transcript of Proceedings 19

Testimony of Mike Miramontez 23
Testimony of Michael McAndrews 28
Testimony of Agnes Banks 32, 78
Testimony of Mark A. Braun 38
Testimony of Dr. I. Joshua Speigel 40, 80
Testimony of James Hillary Whalen 56, 91
Testimony of Dr. Eric Oldberg 58, 87
Testimony of Robert R. Olster 66
Testimony of Huey Grennan 69, 90
Testimony of John Goetzinger 71
Testimony of Martin Lydon 72
Testimony of Patrick Kennedy 89
Testimony of Thomas J. Curran 90
Testimony of Lawrence Banks 90
Testimony of George Grabowski 91
Testimony of Edward J. Wagner 91
Testimony of Frank Costello 91
Testimony of James Hawkins 92
Testimony of Edward Kosiara 92

Defendant's Motion for Summary Judgment 92

Plaintiffs' Motion for Summary Judgment 93

Plaintiff's Exhibits:

Nos. 1—(Motion filed May 1, 1963) 94
2—(Motion filed May 2, 1963) 95
3—(Motion filed May 9, 1963) 96
4—(Answer to Claim for Compensation) 101
5—(Notice Controverting Claim) 102

Findings of Fact and Conclusions of Law 103

Order Entered June 2, 1965 104

Notice of Appeal 104

Stipulation of Contents of Record on Appeal 105

Certificate of Clerk 106

Judgment Order 108

Opinion 109

1 IN THE UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

* * (Caption — No. 64 C 306) * *

PREFIX TO RECORD REQUIRED BY RULE 12(c) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

This action was commenced on February 20, 1964 by Plaintiff, Chicago Grain Trimmers Association, Inc., an employer operating under and subject to the Longshoremen's and Harbor Workers Compensation Act, and the Plaintiff, New Amsterdam Casualty Company, its Workmen's Compensation insurer, which by terms of the Act has primary liability to injured employees or their dependents.

The Plaintiffs sought to set aside an award of compensation made by Deputy Commissioner, R. C. Enos in favor of the widow and dependents of John J. Banks, a deceased employee of Plaintiff, Chicago Grain Trimmers Association, Inc.

By provision of the Longshoremen's and Harbor Workers Compensation Act the Deputy Commissioner is the actual Party Defendant and is represented in the District Court by the United States Attorney.

Agnes M. Banks, widow, and the minor children of John J. Banks, deceased, beneficiaries of the Deputy Commissioner's award, are Parties in Interest only.

2 On June 11, 1964 the answer of Defendant, Deputy Commissioner R. C. Enos, was filed.

On December 28, 1964 a Motion for Summary Judgment with supporting brief was filed by Defendant.

On March 22, 1965 Plaintiff's Motion for Summary Judgment with supporting exhibits and brief was filed.

On March 30, 1965 the Honorable James Parsons, Judge of the District Court for the Northern District of Illinois, accepted the Motions for Summary Judgment and written briefs without oral argument.

On June 2, 1965 the Honorable Judge Parsons entered an order granting Defendant's Motion for Summary Judgment, which in effect affirmed the Commissioner's award, denied the Plaintiff's Motion for Summary Judgment and adopted the Commissioner's findings of fact and conclusions of law.

On July 26, 1965 appeal was taken by Plaintiffs.

Chicago Grain Trimmers Association, Inc.
and New Amsterdam Casualty Co.
Plaintiffs-Appellants
By /s/ Klohr, Braun & Lynch
their Attorneys

3 Placita.

4 COMPLAINT TO REVERSE AND SET ASIDE AWARD OF DEPUTY COMMISSIONER AND TO IMMEDIATELY AND PERMANENTLY ENJOIN ENFORCEMENT OF AWARD

To The Honorable Judges Of The United States District Court For The Northern District Of Illinois:

The complaint of the Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Co. respectfully shows to this honorable court as follows:

1. Plaintiffs, Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Co. bring this action under the Longshoremen's and Harbor Workers Compensation Act (Title 33, Sec. 901, et seq. of the United States Co.) against R. C. Enos, Deputy Commissioner for the 10th Compensation District of the Bureau of Employees Compensation, Department of Labor.

2. On January 26, 1961, John J. Banks was an employee of plaintiff, Chicago Grain Trimmers Association, Inc., and on said date did perform duties upon a barge located on navigable waters of the United States.

3. Agnes M. Banks as widow and James M. Banks, Janice M. Banks and Catherine M. Banks, minor children of John J. Banks, deceased, subsequently filed a claim with The Bureau of Employees Compensation, Case No. 46-71 alleging that John J. Banks sustained an accidental injury while engaged in his employment on January 26, 1961 by being struck on the head by a cable which injury caused him to fall down a flight of stairs at home on January 30, 1961 causing injuries which resulted in his death on February 12, 1961.

4. After hearing the evidence of the parties, Deputy Commissioner, R. C. Enos, issued his decision on June 8, 1961 finding that the death of John J. Banks did not arise out of and in the course of his employment which appears more fully in an exact copy of said decision which is attached hereto as plaintiff's Exhibit B.

5. The award of the Deputy Commissioner was in accordance with fact and the law and no appeal or request for modification was taken by the claimants.

6. On January 30, 1961, John J. Banks was an employee of Chicago Grain Trimmers Association, Inc. and on said date did work for said employer on a barge resting in the navigable waters of the United States.

7. On or about July 31, 1961, Agnes M. Banks, widow and on behalf of James M. Banks, Janice M. Banks and Catherine M. Banks, minor children of John J. Banks, deceased, filed a claim with the Deputy Commissioner of the 10th Compensation District under Case No. 46-73 alleging that the death of John J. Banks on February 12, 1961 was caused by injuries sustained when he fell down a flight of stairs at his home on January 30, 1961 and said fall at home was precipitated by an accidental injury at work on January 30, 1961.

8. Upon receipt of notification of filing of said second claim No. 46-73, the employer moved to strike and dismiss the claim for the reason that it was barred by the prior final determination of the Commission in case No. 46-71 holding that the fall at home and subsequent death of John J. Banks was not related to his employment.

9. On September 21, 1961, a pre-trial hearing conference was had in the office of the Deputy Commissioner, R. C. Enos, at which time the Commissioner advised that the motion attacking his jurisdiction would not be considered or ruled upon as it presented a question of law. The Deputy Commissioner then accepted the request of counsel for claimants that a hearing on the pending claim be postponed indefinitely pending disposition of a related negligence action in the Federal District Court.

10. On September 8, 1961, Agnes M. Banks as Administrator of the Estate of John J. Banks, filed an

action in Admiralty in the Federal District Court against Norris Grain Co. under No. 61C1515 alleging that John J. Banks was injured on January 30, 1961 by the negligence of the Norris Grain Co. and said injury was the proximate cause of the death of John J. Banks on February 12, 1961 and seeking damages in the amount of One Hundred Thousand Dollars ($100,000). Thereafter on
7 trial, a verdict was returned in favor of Agnes M. Banks, Administrator, in the amount of Thirty Thousand Dollars ($30,000).

11. Thereafter, Norris Grain Co. filed a motion for a new trial which the court ordered to stand as granted unless the libelant within 10 days from May 10, 1963 accepted and entered in the record a remittitur in the sum of Eleven Thousand Dollars ($11,000) which order more fully appears from plaintiff's Exhibit C attached hereto. On May 17, 1963, libelant, Agnes M. Banks, Administratrix, accepted the remittitur of $11,000 and asked that judgment be entered for Nineteen Thousand Dollars ($19,000) and thereby forgave the right of Agnes M. Banks and her minor children to a new trial seeking damages of $100,000 as originally prayed.

12. The voluntary acceptance of the $11,000 remitterer was made without the knowledge and without the written consent of the employer, Chicago Grain Trimmers Association, Inc.

13. On August 29, 1963, the second claim of Agnes M. Banks was called for hearing before the District Commissioner, motion was made challenging the jurisdiction of the Commissioner on the ground that the claim was barred by a prior and unapproved settlement of a third

party claim according to Title 33, Sec. 933 (g) and was also barred by a prior final determination of the District Commissioner. The motions were accepted by the Commissioner but not ruled upon and evidence was had on said date and on subsequent dates, proofs being closed and the matter being taken under advisement on October 1, 1963. The testimony heard by Deputy Commissioner, R. C. Enos, in both cases was transcribed in a record which record is in the possession of the defendant, Deputy Commissioner, R. C. Enos, and the plaintiffs request that said record by ordered to be filed in this cause and to be referred to as Exhibit A and be taken and read as a part of this complaint.

14. On January 27, 1964 findings of fact and an award of compensation were entered by District Commissioner, R. C. Enos, granting compensation benefits to Agnes M. Banks as widow and James M. Banks, Janice M. Banks and Catherine M. Banks, minor children of John J. Banks, deceased, all of which fully appear on said award and findings of fact attached hereto as plaintiff's Exhibit D.

15. The award to Agnes M. Banks, as widow and James M. Banks, Janice M. Banks and Catherine M. Banks, minor children of John J. Banks, deceased, by defendant, R. C. Enos, was not in accordance with law in that:

1. The claim for deficiency compensation filed on July 31, 1963, case No. 46-73, was barred by prior settlement not approved by the employer as provided in Title 33, Sec. 933 (g), United States Code.

2. That the findings of fact made by the Deputy Commissioner are not supported by substantial evidence and

are contrary to the evidence presented to the said Deputy Commissioner.

3. That the claim is barred as a matter of law for the reason that the issue as to whether the death of John J. Banks was related to his employment was finally decided in a prior decision of the Deputy Commissioner.

4. That the Commissioner failed to rule and made no finding concerning the employer's motion that the claim was barred as a matter of law.

5. That even upon awarding compensation, the Commissioner erroneously computed the credit to which
9 the employer would be entitled if the claim were not totally barred.

Wherefore, the plaintiffs pray that:

1) Process issue in due form against defendant, R. C. Enos, Deputy Commissioner, requiring him to answer the exigencies of this complaint.

2) That an interlocutory injunction issue out of this court enjoining payments due under the order of the Deputy Commissioner.

3) That an order issue that the transcript of proceedings before said Deputy Commissioner be sent to this honorable court for review.

4) That the plaintiffs have such other and further relief required to vacate and set aside the findings of fact and the award of the Deputy Commissioner.

Chicago Grain Trimmers Association, Inc.
and New Amsterdam Casualty Co.
By /s/ Klohr, Braun & Lynch
Attorneys for Plaintiffs

Mark A. Braun being first duly sworn says that he is one of the attorneys for the plaintiffs above named; that he has read the foregoing petition and knows the contents thereof and believes the same is true and correct.

/s/ Mark A. Braun

10

EXHIBIT "B".

COMPENSATION ORDER.
REJECTION OF CLAIM.
CASE NO. 46-71.

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with the law, the Deputy Commissioner makes the following:

FINDINGS OF FACT.

That on January 26, 1961 the employee above named was in the employ of the employer above named on board a barge afloat upon the navigable waters of the United States at the employer's dock, Chicago, Illinois, in the Tenth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act; that the liability of the employer for
11 compensation under the Act was insured by the New Amsterdam Casualty Company; that on said date the employee herein was employed as a "button man" or operator of a mechanical shovel attached to steel cables one-half inch in diameter, the steel cables being used to pull the shovel, via electrical energy and blocks and tackles, in the operation of unloading grain; that during the afternoon of said date one of the cables attached to

the shovel the employee was operating broke; that the cable was replaced and the employee finished the day's employment in the usual manner; that none of the other employees working on the job that day had any knowledge that John J. Banks had been struck by a broken cable or had sustained an injury of any kind as a result of the broken cable; that after work on said day the employee accompanied a coworker to the company office and was observed by the coworker to have a small red scratch on the left side of his forehead; that on arrival at his home on said date the employee told his wife he had been hit by a cable that afternoon; that his wife lifted his hat, examined the left side of his head, and saw nothing unusual; that later in the evening of said day the employee complained of headache and took one or two aspirin tablets for relief; that at the time the aspirin was taken a visitor in the home observed a small black spot the size of a pencil dot on the left forehead, about one inch above the outer aspect of his left eyebrow; that the employee made no complaints with respect to his head thereafter; that the employee returned to his usual duty on Friday, January 27, 1961, and performed in his usual
12 manner; that Saturday and Sunday, January 28 and 29, 1961, respectively, were nonworkdays and were spent by the employee quietly at home; that the employee worked on Monday, January 30, 1961, in his usual manner and with no complaints; that after work was finished on January 30, 1961 the employee reached his home at approximately 4 p. m.; that his wife was in the basement of their home washing and ironing; that approximately 30 minutes after his arrival at home the employee went to the head of the basement stairs and called to his wife

that he wished to ask her something; that his wife then looked up from where she was standing in the basement and observed him to stiffen and pitch forward, head first, down the basement stair, landing on the right side of his head on the concrete floor of the basement; that the employee died February 12, 1961 as a result of the injuries incurred in the fall on January 30, 1961; that on February 20, 1961 Agnes M. Banks, surviving wife, filed a claim against the employer on behalf of herself and her three minor children, James M. Banks, Janice M. Banks, and Catherine M. Banks, for death benefits provided by the Longshoremen's and Harbor Workers' Compensation Act, alleging that the fall which caused the employee's death was a consequence of an injury sustained on January 26, 1961, and which arose out of and in the course of his employment; that considering all the facts and surrounding circumstances it is not established that the employee's death was the result of an injury which arose out of and in the course of his employment on January 26, 1961.

13 Upon the foregoing findings of fact, It Is Ordered by the Deputy Commissioner that the claim for death benefits be and it is hereby rejected for the following reason:

1. The death of the employee did not arise out of and in the course of his employment.

Given under my hand at Chicago, Illinois, this 8th day of June, 1961.

/s/ R. C. Enos
Deputy Commissioner

PROOF OF SERVICE.

I hereby certify that a copy of the foregoing Compensation Order has been sent by registered mail to the following-named parties at the last known address of each:

Mrs. Agnes M. Banks, 3520 East 112th Street, Chicago 17, Illinois

Herbert H. Moses, Esq., 2945 East 91st Street, Chicago 17, Illinois

Chicago Grain Trimmers Association, Inc., Lake Calumet Transit Dock No. 1, Butler Drive, Chicago 33, Illinois

New Amsterdam Casualty Company, 175 West Jackson Boulevard, Chicago 4, Illinois

Klohr, Merrick, Braun & Lynch, 105 South La Salle Street, Chicago, Illinois

/s/ R. C. Enos
Deputy Commissioner

Mailed: June 8, 1961.

14 EXHIBIT "C".

Name of Presiding Judge, Honorable John W. Holland.

Cause No. 61 C 1515. Date 5/16/63.

Title of Cause: Agnes Banks, Admtr. v. Norris Grain.

Brief Statement of Motion: Libelant motion to accept $11,000 remittitur and enter judgment in the sum of $19,000.00.

Names and Addresses of moving counsel: Harold A. Liebenson.

Libelant accepts $11,000.00 remittitur. Enter judgment for libelant for $19,000.00 and costs.

A true copy teste
Elbert A. Wagner, Jr.
Clerk
By /s/ Dorothy Aldridge
Deputy Clerk
Sept. 6, 1963

15 Name of Presiding Judge, Honorable John W. Holland.

Cause No. 61 C 1515. Date May 9, 1963.

Title of Cause: Agnes Banks, Administrator, etc. v. Norris Grain Company.

Brief Statement of Motion: Hrg. on post trial and post judgment motion, if any, and deposition of Motion of respd. for directed Verdict at close of libelant's case now under advst.

Names and Addresses of moving counsel: Director & Liebenson, 77 W. Washington (2) Representing Libelant.

Names and Addresses of other counsel entitled to notice and names of parties they represent: Hinshaw, Culbertson, Moelmann & Hoban, One N. LaSalle St., Chgo. 2.

Argts. hrd. Mo. of respdt. for directed verdict made at close of Libelant's case denied. Motion of respdt. to set aside verdict and jdgt. entered thereon and to have jdgt. entered in accordance with respdt's. mo. for directed verdict denied. The respdt's. Mo. for New Trial will stand granted unless the libelant within 10 days from this date enters in the record a remittitur in the sum of $11,000.00.

A true copy teste
Elbert A. Wagner, Jr.
Clerk
By /s/ Dorothy Aldridge
Deputy Clerk
Sept. 6, 1963

16 EXHIBIT "D".

COMPENSATION ORDER
AWARD OF DEATH BENEFITS
CASE NO. 46-73 (FATAL)

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with the law, the Deputy Commissioner makes the following:

FINDINGS OF FACT.

That on January 30, 1961, John J. Banks, hereinafter referred to as "employee," was in the employ of the employer above named, at Chicago, Illinois, in the Tenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act; that the liability of the employer for compensation under the said Act was insured by the New Amsterdam Casualty Company; that on said date the em-
17 ployee herein while performing service for the employer as a grain trimmer aboard a barge afloat upon the navigable waters of the port of Chicago sustained an injury which caused disability, as a result of which he died on February 12, 1961; that the original injury occurred when a rope (1-inch in diameter), which was attached to a power shovel the employee was using to move grain, broke high up on a marine leg causing the rope to coil and fall a distance of approximately 50 feet from the point of breakage, striking the employee on the top of the head and as a consequence he suffered an acute subdural hematoma which, some two hours later, caused him to fall forward down a flight of basement steps at his home resulting in multiple injuries, including a basal

skull fracture, which caused his death on February 12, 1961; that the injury and death arose out of and in the course of the employment; that written notice of injury and death was not given to the employer within thirty days, but that the employer had knowledge of the injury and death and has not been prejudiced by the lack of such written notice; that emergency medical and hospital treatment was obtained and arranged by the employee's family, the reasonable cost of which is a liability of the employer and the insurance carrier; that the average weekly wage of the employee herein at the time of injury and death exceeded $81.00; that Mrs. Agnes M. Banks, who was born August 24, 1916, and was married to the decedent on November 16, 1935, is the surviving wife of the employee and as such she is entitled to death benefits at the rate of $28.35 per week (35 per cent of $81.00), beginning February 13, 1961, subject to the provi-
18 sions of the Act; that James M. Banks and Janice M. Banks, both born October 21, 1947, and Catherine M. Banks, who was born December 3, 1950, are the surviving minor children of the employee, under the age of 18 years, and are entitled to death benefits at the rate of $8.55 each per week (⅓ of $25.65, which is the difference between the surviving wife's compensation of $28.35 per week and the maximum compensation rate of $54.00 per week) beginning February 13, 1961; that the payment of such death benefits shall be made to Mrs. Agnes M. Banks as the surviving wife of the employee and mother and natural guardian of the surviving minor children, subject to the provisions of the Act with respect to continuing dependency, age, maximum weekly rate of compensation, and the credit remaining from the recovery made against the third party responsible for the death

of the employee, the findings of which will be set forth herein; that funeral services were rendered on behalf of the employee by Claude E. Griesel Mortuary, 10240 South Ewing Avenue, Chicago, Illinois, the charge for which amounted to $2,606.82; that the employer and the insurance carrier are liable for the payment of $400.00 as reasonable funeral expenses; that a suit was entered in the United States District Court for the Northern District of Illinois, Eastern Division, by Mrs. Agnes M. Banks as administratrix of the estate of John J. Banks, on behalf of herself and the surviving minor children of the employee, against the Norris Grain Company as a third party responsible for the death of the employee; that as a result of the lawsuit against the third party a gross recovery in the amount of $19,000.00 was obtained;
19 that the employer and the insurance carrier are not liable for the payment of deficiency compensation, as provided in section 33 of the Act, until the amount of the recovery against the third party is absorbed or liquidated by the allowable expenses incurred in connection with the suit and the accrual of death benefits which exceed the amount so recovered; that the allowable expenses in connection with the lawsuit are as follows:

1.	Attorneys' Fees	$6,333.00
2.	Testimony of Dr. I. Joshua Spiegel	300.00
3.	Court Reporter	312.35
4.	Investigation	15.50
5.	Photographs	12.00
6.	Witness Fees	143.48
7.	Court Costs	17.20
8.	Copy of Court Order	1.25
	Total	$7,134.78;

that the accrued death benefits are as follows:

Medical Treatment, Dr. Otto Koehler	$100.00
Medical Treatment, Dr. I. Joshua Spiegel	75.00
South Chicago Community Hospital	488.55
Reasonable Funeral Expenses	400.00
Total	$1,063.55;

that the expenses of the lawsuit and the medical, hospital, and allowable funeral expenses amount to a total of $8,198.33; that after the deduction of $8,198.33 from the gross recovery of $19,000.00 there is a credit balance of $10,801.67 from the third party recovery; that each of the three surviving minor children was awarded by the court in his or her own right the sum of $801.23, or a total of $2,403.69, which was paid to Mrs. Agnes M. Banks as administratrix of the estate of John M. Banks and which amount has been placed in a bank for the three surviving minor children; that the net third party credit in the hands of Mrs. Agnes M. Banks, on her own behalf as the surviving wife of the decedent, amounted to the sum of $8,397.98 after credit for the above-stated deductions; that such net third party credit will be absorbed by the accrual of death benefits on October 18, 1966; that the accrued death benefits due the three surviving minor children from February 13, 1961 to January 26, 1964, inclusive, are 154 weeks and at the combined rate of $25.65 per week (3 x $8.55 each) amount to $3,950.10; that after deducting the sum of $2,403.69 (3 x $801.23, the amount each surviving minor child recovered against the third party), there is a balance of $1,546.41 due; that nothing has been paid by the employer and the insurance carrier as death benefits.

Upon the foregoing findings of fact the Deputy Commissioner makes the following:

AWARD.

That the employer, Chicago Grain Trimmers Association, Inc., and the insurance carrier, New Amsterdam Casualty Company, shall pay to Mrs. Agnes M. Banks on behalf of James M. Banks, Janice M. Banks, and Catherine M. Banks death benefits for 154 weeks at the combined rate of $25.65 per week from February 13, 1961 to January 26, 1964, inclusive, which amount to the sum of $3,950.10, from which is to be deducted the sum
21 of $2,403.69 (third party recovery), leaving a balance of $1,546.41 due and payable in one sum forthwith, payments thereafter to continue in biweekly installments at such combined rate subject to the provisions of the Act. That the employer and the insurance carrier shall on October 18, 1966 commence the payment of death benefits to Mrs. Agnes M. Banks on her own behalf at the rate of $28.35 per week, and continue such payments in biweekly installments subject to the provisions of the Act.

A fee in the amount of $700.00 is approved in favor of the firm of Director & Liebenson, 77 West Washington Street, Chicago 2, Illinois, for legal services rendered in presentation of the claim, such fee to be a lien against and deducted from the compensation due.

Given under my hand at Chicago, Illinois, this 27th day of January, 1964.

/s/ R. C. Enos
Deputy Commissioner

22 Proof of Service.

ANSWER OF DEFENDANT DEPUTY COMMISSIONER

Defendant, R. C. Enos, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, for his answer to the complaint herein:

1. Admits the allegations contained in paragraphs numbered 1, 2, 3, 4, 5, 6, 8 and 14.

2. Admits the allegations contained in paragraph numbered 7, save the allegation with respect to the date of filing of the claim which defendant denies and alleges was August 22, 1961.

3. Neither admits nor denies the allegations of paragraphs 9, 10, 11, 12 and 13 since all the evidence with reference thereto is contained in the record of the proceedings before the deputy commissioner here under review, to which record, when filed, the Court is referred.

24 4. Denies the allegations contained in paragraph numbered 15.

5. For a further defense, defendant deputy commissioner alleges that the compensation order complained of is in all respects in accordance with law.

Wherefore, defendant deputy commissioner prays that the complaint be dismissed.

/s/ Edward V. Hanrahan
United States Attorney

25 Affidavit of mailing.

TRANSCRIPT OF PROCEEDINGS, CASE NO. 46-73

U. S. Department of Labor, Bureau of Employee's Compensation

(Testimony started August 29, 1963)

A March 6, 1964—Letter of Certification and Transmittal of Deputy Commissioner Enos to Frank E. McDonald, United States Attorney, Under Case No. 46-71 included in pages 1 through 304 and transcripts of testimony under case No. 46-73 included in pages 1 through 263.

B Index of Witnesses in Proceedings Before Commissioner on August 29, 1963 and October 1, 1963. Case No. 46-73.

1 Proceedings in the case of Agnes M. Banks, surviving wife and James M. Banks, Janice M. Banks and Catherine M. Banks, minor children of John J. Banks, deceased, as claimants against Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Company, carrier, were commenced before Deputy Commissioner, R. C. Enos of the 10th Compensation District at 10:00 A.M. on August 29, 1963. Present was Attorney Harold A. Liebenson for claimant and Mark A. Braun for the employer-carrier.

2 Deputy Commissioner Enos: This is a hearing on the application of Agnes Banks for herself as widow and for her three (3) minor children under the Longshoremen's and Harbor Workers' Compensation Act for death benefits provided by the Act

alleging that John Banks died on February 12, 1961
3 as a result of injuries sustained on January 30, 1961 while employed as a grain trimmer. Administrative reports on file with the Commissioner revealed that on January 30, 1961, John J. Banks was employed by the Chicago Grain Trimmers Association, Inc. at a wage in excess of $81.00/week and on said date was employed aboard a vessel which was afloat on the navigable waters of the United States and while so employed on January 30, 1961 allegedly sustained injuries which caused his death on February 12, 1961.

Reports further reveal that a law suit in the Northern District of Illinois against Norris Grain Company resulted in a jury verdict of $30,000 damage in behalf of Agnes M. Banks, administratrix for the Estate of John J. Banks. The presiding judge, John W. Holland, released an order on May 16, 1963 reducing the judgment to $19,000, with a remittitur of $11,000.

4 The issue here is a claim for a deficiency compensation award under Section 33 of the Longshoremen's and Harbor Workers' Compensation Act. The liability under the Longshoremen's and Harbor Workers' Compensation Act was insured by New Amsterdam Casualty Company and the employer and its carrier have filed a notice of controversion of the claim on September 21, 1961 contending that the claim for benefits because of the death of John J. Banks were determined under the Decision of Commissioner R. C. Enos of June 8, 1961. The findings of the order of June 8, 1961 pertain to a claim for benefits as a result of an injury alleged to have been sustained on

January 26, 1961. The current claim involves an injury alleged to have been sustained on January 30,
5 1961. Because of the different date alleged and under different circumstances, a hearing on the claim is justified.

Mr. Braun: I would like to have the record show that the controversion filed by the employer also contends that there was no accidental injury on January 30, 1961 and there is no causal relationship between an alleged incident and the subsequent injuries sustained by decedent in his home.

6 Mr. Braun: The employer wishes to present a formal motion setting forth in greater detail and with exhibits the facts surrounding the settlement of the Federal Court action and the acceptance of the plaintiff of $19,000 in settlement in lieu of a new trial.

7 Mr. Liebenson: I would like to file an answer.

Deputy Commissioner Enos: Permission to file an answer granted. I will give you ten (10) days if you want it.

8 Mr. Braun: A further contention of the respondent that this proceeding is barred because of the preceding hearing is before this Commission in the nature of a formal petition.

Deputy Commissioner Enos: I don't believe I have a formal petition but you have stated that is your position and it can always be developed to a greater degree at a later date by briefs.

9 Mr. Braun: I want to make certain that my participation in this hearing will not waive any of the objections we have to the jurisdiction of the Commission or any other of the defenses.

Deputy Commissioner Enos: That's understood.

It is agreed by the interested parties that the relationship of Agnes Banks and the three children: James, Janice and Catherine Banks, under the age of 18 years, would be accepted by the Carrier as surviving beneficiaries entitled to the benefits, if any.

10 The death certificate is received in evidence as claimant's exhibit 2.

9-19 Discussion between Commissioner and attorneys regarding medical expenses incurred on behalf of decedent as well as court costs, including cost of expert witnesses in Federal Court case and allocation and distribution of proceeds of settlement of Federal District court action.

20 Mr. Liebenson: I submit the Coroner's record of the last page of Coroner's record.

21 Deputy Commissioner Enos: It's questionable whether it is submissible but I am admitting it for what it is worth.

22 Petitioner's Exhibits 4, 5, 6 and 7 were identified being photographs. It was agreed that the Coroner's Protocol, claimant's Exhibit 3, would go into evidence, including the pathological report and protocol on John Banks. They are admitted only as things that the person making the document would testify to if he were present in person.

MIKE MIRAMONTEZ, Witness for Claimant, testified:

Direct Examination by Mr. Liebenson.

I worked as a grain trimmer on January 30, 1961. That was a Monday and I worked at Norris Elevator. Claimant's Exhibits 4, 5, 6 and 7 shows where I was working at Norris Grain Elevator on January 30, 1961 and correctly portray that elevator. We were suppose to start working at 8:00 but sometimes it would take an hour or so to get the barge ready to move it. We starting working pretty close to 10:00 o'clock. On that date, Johnney Banks was the boss and my job was pulling the rope. Using claimant's Exhibit 8, when the barge comes in, the marine leg is lowered into the barge. There are buckets in the marine leg that pull the grain up to the elevator. There is a rope or shovel at each corner of the marine leg bringing the grain to the bucket. When they want to bring grain to the shovel, they pull a rope and throws a clutch in which pushes this shovel. There are 4 shovels and 1 rope controls each shovel. The man running the shovel is called the tripper. He has two lines, one to push the clutch in and one to release the clutch. On the marine leg there are at least 5 sets of ropes that you can see in the picture, 4 for each shovel. John Banks was a tripper at about 2:00 o'clock, January 30, 1961. He was one of 4 trippers. I was a rope puller and it is his job to pull the rope when they bring the shovel in when they stop when they get to the bottom. He pulls the rope down after the shovel reaches the marine leg to loosen it so that they can bring the shovel back again. I was

working on the left side of Mr. Banks. I was about
32 20 inches from him. The rope that is handled by the puller comes from the top. They had drums up there.
33 The pulleys are about 50 feet from the ground. The rope goes in at that point and goes far back to the drums and the drums are attached to motors. The rope we use for the shovels is about 1 inch, I think.
34 It's regular rope. It's twine. It is not nylon. I guess that 50 feet of that rope would weigh more than 30 pounds.

35 Mr. Braun: I object to both guesses as to distance and his guess as to weight.

John Banks was standing to my left and you know that it broke. The whole thing, a big pile of rope come.

Mr. Liebenson: Where did the rope break?

A. Well, it breaks on the top, on the inside. When
36 it broke it came fast, you know, and it piled, you know, a big pile.

When it came down, it's round, rolling down. (Indicating like a circle.) When I saw it when it stopped, you know, I looked at the man. He was on my left. The whole pile come on top of his head. That was Johnny Banks. He was wearing a hat or a cap. When the rope hit him, he went forward and down.
37 After he went forward and down, he got the rope off
38 his head and started rubbing his head. When a rope breaks, they fix it. It was 25 to 30 minutes before
39 the rope was fixed and during that time, John Banks rubbed his head. We then went back to work and we work until sometime before 4:00 o'clock. After January 30, 1961, two men came to my house to take a statement. Claimant's exhibit 9 showing to witness.
41 I can't hardly read.

Exhibit rejected unless the witness could identify
43 it. I figured the rope that hit Mr. Banks was pretty close to 30 pounds but it's hard to tell. They keep the rope on the inside of the house. Sometimes they stay out there. It all depends. I don't know if it was dry or not. The rope fell close to 50 feet from where it come out. It must be from there, from the wall up there, see, yet are the drum is, and I can't
44 tell you where, what part of it broke. After I left work at about quarter to 4:00, everybody went home and I did not see John Banks.

Cross Examination by Mr. Braun.

45 On January 30, 1961, I worked at Norris Elevator. The rope from the shovel in the barge ran through a block into the marine tower. The rope comes from
46 the tower and goes down to the bottom of the leg in the barge. My job was to pull the rope from the tower and pull it down so it would be slack in the barge and the rope came through my hands many times on January 30 and it was dry. I don't know if
47 it was dry. I use gloves handling it. It could be dry because I don't think it was wet. And I don't pay any attention if it is wet. It's hard to tell. When I was pulling the rope, I would be looking into the barge. I would not be looking at Mr. Banks, and I
48 wouldn't be looking at the marine tower either. I didn't see the rope break and nobody saw it break and I don't know where it broke. If the rope broke right at the barge or half way up to the tower, the top half would be drawn up into the tower. But on
49 January 30th, I didn't know where it broke.
50 I had just guessed that it was 50. Judging from the photograph, it could be less than 25 feet from

the ground to where the rope goes into the tower and John Banks was standing on the level of the barge which was a little higher than the ground. I said that the incident when the rope broke happened sometime after 2:00 o'clock, 2:00 or 2:30. It could have been as late as 2:30. It took about a half hour to fix the rope and then we went back to work. After that, we worked almost 2 hours, close to 2 hours. It was about an hour and a half that we worked after they fixed the rope and John Banks worked with me until we finished the barge. John Banks worked during that time and he didn't make any complaint and I didn't see any marks, cuts or bruises on him. When the rope broke, I was looking down into the barge and I didn't see it break. When it fell, some of the rope hit me on my side, my left shoulder. The first time that I knew a rope was broken was when I saw the shovel stop. I was looking down into the barge. When the shovel is moving through the grain, the tripper can pull his rope and stop it at any time. When some of the rope touched me, I turned around. I did not turn around before the rope hit me because I was looking down. When I turned around, John Banks was right next to me. I saw rope on the top of his head. You know, it was the rope hit me, you know. I stands up and look around. When I looked around, his hands were on the hatch cover. They went down on the top of the barge. The hatch cover is approximately three or four feet higher than the part we were standing on so a man can put his hands forward right onto the hatch cover and when I first saw John Banks, he had his hands on the hatch cover. When I saw him with his hands on the

hatch cover, the rope was still piled up on his head. It looked like a pretty good size pile. I don't know how to explain it. It was coiled up tight, like a ball on top of the man's head. It was just a round pile. It's kind of hard to explain. He brushed the rope off himself and stayed standing there on the barge.
63 He kept working in his normal fashion after that, the same way he worked before. We all reported to the elevator at 8:00 o'clock. John Banks was with me at 8:00 o'clock. He was there with me all that
64 day. John Banks was the boss and he stayed with us from 8:00 o'clock until we went home. We went home before 4:00 o'clock but I can't tell how long before that. Some of the elevators we work at use cables and some use ropes. At Norris, we used ropes and there are some other places that used ropes. I
65 have worked with rope many times. I have seen them break many times. A lot of times these ropes have hit me. When they fall they come on the top of the man. They come all over but I didn't see them on
66 the head. A few years ago, one hit me and almost knocked me down (indicating back of head and neck). That was a number of years ago. I was working at Wisconsin Steel. After that I continued to work that day.

There was only one time that I saw John Banks get hit on the head with a rope and on that day, I worked with him from 8:00 o'clock until the end of
67 the day, until quitting time. On April 8 some men came out to see me. They asked me questions. As far as I know, I told him I worked with John Banks that day from 8:00 o'clock 'til quitting time and that we quit about 2:30 in the afternoon and that

we worked another hour after they fixed the rope. Something like that I figure, I don't remember if I told that or not. On that date John Banks had a
68 cap on and it was winter time and it was cold. It was a wool cap. He never used ear-flaps if he had them they would be turned up on the top of the cap.

I don't know who was working the shovel on the rope that I was pulling.

Cross Examination Completed.

69 *Examination of Witness Miramontez by Deputy Commissioner Enos.*

MICHAEL McANDREWS, Witness for Claimant, testified:

72 *Direct Examination by Mr. Liebenson.*

My name is Michael McAndrews. I have lived at 1229 West 79th Street for 14 years. On January 30, 1961, I was working at the Norris Grain Elevator.
73 On that day, I was tripping in. They have four trippers on each elevator. I was on the South end of the barge and I was facing the marine tower. About 2:00 o'clock in the afternoon, I was looking down to see where my man was going when I heard this crack and automatically I looked up and there everything was coming down. When I say crack, I mean rope crack. Up above, looked like it was up above. All at once I saw the rope way down on top of Johnny.
74 I'd say maybe 50 or 60 feet of rope was on him. It first struck his head, everything come right down on top of him.

I have worked this same type of rope before. I figured the rope weighed about 20 or 25. After the

rope hit him, he caught the rope and jumped off the barge and all he said was "Damn it, Damn it, it hurts, it hurts." After his rope broke, I continued to
75 work as my shovel was still operating. I don't know if the rope was wet or dry.

Whether a rope breaks all depends on the weather, sometimes a month or maybe 6 months you have a job and maybe eight months you have another job.

Cross Examination by Mr. Braun.

76 I worked at Norris that day. I forget the date proper but I worked that day because I was on the job. I can't remember right off hand the date this happened. It's so long ago I can't tell the exact date but I know it was in the Fall of the year. That I know. When I say the Fall of the year that could be November or December and there was only one time that I saw anything fall on Johnny Banks.

77 Norris is at 98th and River. We got to the job a little late, about 9:00 o'clock or maybe 10:00 because we finished one hatch at Calumet Elevator.

We finished work around 2:00 or 2:30.

I don't remember whether when I testified in the Federal Court I testified that we quit just before
78 4:00 o'clock. We only worked about a half hour after that happened and I think of it as happening in the Fall of the year.

When I was working on this barge, I was looking down into the barge at the shovel and I did not see the rope break. All I heard was a noise and I don't know at what point it broke. I know it broke above that shiv in the house but I didn't see it break. When I first saw it it was practically all down on top of him. The rope was on top of Johnny when I saw it.

79 It was near the ground not more than 6 feet from the ground. It happened like this: As soon as you look up, she's down. It's hard to explain. The first thing I heard was the crack and everything was all over. Johnny was covered. That's it. Did I see the rope fall on him? Yes, it was falling. I saw it when it was falling. The whole thing comes so quick.

80 The only way I can answer is to say that I am tripping in here like this. When the rope cracked, that came down like this, come across and hit him. The rest bounced on and came right down on top of him. That's all I see. I wouldn't say it was all together just sitting on top of his head. I couldn't say

81 that 50 feet of rope all coiled up. I said the whole thing come down on his head. I think it was about 50 feet at least but I wouldn't say 50 feet fell down and coiled up on his head. He had to fight it off his body. It coiled all over his body but I couldn't say the whole the whole works on his head. There was a

82 whole lot of it on his head. It's hard telling whether it was it was three feet. I'd say the whole works hit him. What missed his head—he was covered with rope. I think it was 50 feet that fell. It's hard telling how much went on his head. He had to get out from under the rope and immediately after that, he jumped back on the dock.

83 On the date I talked about, I don't remember who was on my shovel down in the barge but Johnny was the boss at Norris that day. Sometimes the boss leaves the job shortly before it's finished to call the office for the next days assignments. I can't recall if

84 John Banks did that on this day. He did work for awhile after the rope fell. He worked until the job

85 was finished. I couldn't say whether John Banks

called in that day because I was busy running my shovel.

86 I have known John Banks for many years and I knew Mrs. Banks through Johnny. I went to the wake but at the wake I didn't mention anything about this rope to Mrs. Banks when I talked with her and I didn't mention anything about the rope until 1963.

87 John Banks usually wore a cap when he went to work. These were heavy caps and that cap did not fall off and it stayed on when he jumped over onto the dock and he had earlaps on that day. It was a cold day. I had a jacket on with a hood on and that
88 hood was up over my head and I had a cap on plus the hood over it. John Banks just had a cap on.

After this day, I continued to work regularly on the docks for Chicago Grain Trimmers. I was a member of the Grain Trimmers Association as was John Banks and for 2 years after this happened, I never mentioned the rope incident to anybody. After it happened I didn't see any marks or bruises about
89 John Banks. I was asked about the weight of that rope today and my answer was just a guess.

90 *Redirect Examination by Mr. Liebenson.*

The last time that I ever saw John Banks work was the day of this incident. No, no, no, I had never been sociable with John Banks' family, that is, to go out with them.

91 *Recross Examination by Mr. Braun.*

John Bank's brother works for the same company that I do. I didn't see John Banks' son frequently. I worked with him maybe twice a year. It all depends upon what job your on.

94 AGNES BANKS, witness on her own behalf, testified:

Direct Examination by Mr. Liebenson.

My name is Agnes Banks. I am the claimant and I am the widow of John Banks. He was 49 at the time of his death. He was 5 foot ten and a half and weighed between 175 and 180. His occupation was that of a grain trimmer which is work he went into regularly in 1934. Prior to his death, he has been in good physical condition and had not been under the care of a physician for at least 3 years. About 4:30 in the afternoon on January 30, my husband
95 came home. Mr. Whalen was with him. I was in the basement and they came to the basement. John did not tell me right out where he had been and he did not say anything about a tavern. When I observed him, he was sober. He came to the stairway
96 and said he had brought company. I was pressing pants. He and Mr. Whalen came down stairs. After the pants were pressed we went back up. He carried Leesa up the stairs. Then he asked Mr. Whalen if he wanted a beer and I went back downstairs to my washing machine. In the meantime, Whalen son picked
97 him up and John came to the stairway. There are 11 stairs from the first floor to the basement. They are normal width for a home. He said "Ag, I want to tell you something," but he never got to tell me. He never said another word. He came down. He
98 came forward and when I seen his body coming straight this way, I went like this, but I didn't help him at all.

Deputy Commissioner Enos: You're saying, Mrs. Banks, that he pitched forward from an upright, straight position.

The Witness: He came from the top of the stairs without touching the stairs and came right through the air. His arms were toward his side, just like he was talking to me. He did not do anything with his arms and he did not cry out either. I ran upstairs
99 and called Tommie. He was unconscious. His eyes were closed and he didn't answer. I called other members of the family. The pulmotor was called.
100 He was taken to South Chicago Hospital. He remained there to February 12, 1961. To my knowledge, he never regained consciousness to the full extent when I saw him during that time.

101 Deputy Commissioner Enos: May I inquire Mrs. Banks, you described what happened when you came around the stairs. As I understand you to say, he went down in a forward position, he didn't even hit the stairs on the way down.

The Witness: No, he didn't. He was quiet.

Cross Examination by Mr. Braun.

102 Q. Regarding your statement about your husband's health, in this regard you will recall testifying before Mr. Enos once before, don't you?

Yes, I do and at that time, I told Mr. Enos that 3 days before on Thursday evening, he had complained of a headache and he had taken aspirin and that on the following days, Friday, Saturday and Sunday, he was unusually quiet for him. I believe that was on Sunday. I did not testify that he didn't follow his regular activity on Saturday. I said

it was Sunday. His conduct was not unusual on Sun-
103 day morning. On Sunday morning, he had asked of me to scratch his back. The manner in which he asked me was unusual and his activity of not working his crossword puzzles was unusual.

Q. And on Saturday, he simply stayed home, didn't go out at all and that was unusual, is that correct?

A. I myself am a person who is about my house.
104 I said he was home on Saturday, and I did my work as usual, but he had a day off on Saturday. I did not say I observed him on Saturday. My husband evidently wasn't as active as usual on that Saturday.
105 I don't know if it's a fair statement to say he wasn't as active as usual. He usually sat and watched television anyway so I would say that he was his own active self to a stage.

On Monday morning, he told me not to make any lunch for him. Normally, I made a lunch for him and he took a lunch. He said he wasn't taking a
106 lunch. He did not have breakfast that morning either. He drinks coffee. He didn't eat breakfast a lot of mornings. On January 30, he drank coffee but had no solid food and I did not make a sandwich for him. As far as I know, he had no food from the time he got up in the morning until the time he got home
107 but the men at work go out for rolls and coffee every morning but I was not there. After he came home that Monday evening, I had a conversation with him. He made no complaint to me about feeling ill. After we were in the basement, he opened a can of beer
108 for Mr. Whalen and one for himself but he did not touch the one he opened for himself. Mr. Whalen did not say where he and my husband had been before

they came home. The second time my husband came
109 to the top of the stairs, I was by the washing machine about 10 feet from the bottom of the stairs. When you're standing at the washing machine, you can see
110 the top of the stairs from one side. From the machine to the stairs is 10 feet but from the machine over to here is a few steps and you could look right up.

Q. What is here. I mean, I don't understand what you mean, "From the machine to here."

A. You understand all right. Here is the machine. Say there's two sides.

110-112 Further discussion about distance of washing machine from stairway.

112 When my husband fell down the steps, he never touched any of the steps, he hit the concrete floor below. He was taken to the hospital on the 30th day of January and I talked to the doctors and they asked about him generally. At about 8:30 that night, I
113 talked with the specialist. The specialist was Dr. Tinsley.

114 At the time of my husband's wake, many of his associates at the Chicago Grain Trimmers were there. None of these men said anything about a rope break-
115 ing. None of the men from the Trimmers Association mentioned anything about a rope breaking. My husband's brother and my son are very active in the Trimmers Association and my own brother whose name is Costello is also active in the Trimmers Association.

116 On January 30, my son worked with the Trimmers Association at Norris Elevator with my husband,
117 that is, my son Thomas. On January 30 when my son Tom came in the house from South Chicago he said,

"let me tell you something". He said, "Dad," he said, "He got hurt, but not to say nothing to you today." And I said, "All right, I'll make off I don't know anything." But this after he fell down the stairs, this was all forgotten. But like anything else happens in one's house, you try to remember the days goings on, and Tom said, "Ma, I told you about that on Monday," but he said, "Remember Dad, he said don't tell you."

118 It was not until later that things settled down and then Tom said, "Ma, I did tell you." That was after the funeral when he said that and we were sitting down and we were talking about different things like any family does. It would be in the month of February, 1961. It could have been near the end of February.

That conversation was had prior to the time that I testified before Mr. Enos in June of 1961.

Q. You didn't tell Mr. Enos anything about that
119 at that time, did you.

A. At that time, when I came in here, this was something that was mentioned, and it was forgotten about, and it wasn't until even after the other trials, is what I'm trying to tell you, after the other trial was over here, when we were through and Mr. Enos' office. Now, this would have been later.

Q. But you did talk about it?

A. And Tom reminded me.

Q. But you talked about it before, that you have told us, in February?

A. But like I said, there was no real definite marking on it, and his father told him to forget it, and evidently that is why it left—

Q. But he had told you about it, too, hadn't he?

A. Who?

Q. Tom. You told us Tom told you about it also?

A. He told it to me.

Q. All right, now, let me ask you this question, Mrs. Banks—

A. Like I says, he had told it to me.

Q. Prior to the time that you came here the first time and testified before Mr. Enos, you had gone over this entire matter in great detail with your lawyer, hadn't you?

120 A. Yes.

Q. Yes. And you had gone over it in great detail with your husband's brother, Lawrence Banks, hadn't you?

A. I don't know about the great detail with my husband's brother, Lawrence.

Q. Well, Lawrence came in to testify at that time, didn't he? Didn't he?

Mr. Liebenson: Yes or no.

The Witness: Yes.

Q. Mr. Braun: And you had gone over this matter with your brother, Mr. Costello, hadn't you?

A. Yes.

Q. And he came in to testify here?

A. My brother did come to testify.

Q. And you had talked about this with Mr. Whalen, hadn't you, before that trial?

A. No, I did not, sir.

Mr. Braun: I think that's all.

Mr. Liebenson: Just a few questions.

Redirect Examination by Mr. Liebenson.

January 30th was a Monday. He worked Friday.
121 He also worked Thursday. My son never told me that he saw my husband get hurt.

122 MARK A. BRAUN, Counsel for Employer-Respondent, called by claimant's counsel, Witness for Claimant, testified:

Direct Examination by Mr. Liebenson.

Pursuant to a subpoena served on New Amsterdam Insurance Company, I appeared in court and produced certain statements. Claimant's Exhibit 9
123 appears to be a photocopy of one statement I did produce under court order of Judge Robson in the District Court in Chicago. I believe your copy is an accurate copy of the original. The preamble to the statement states it was taken on April 8, 1961.

This statement was not in my possession at the time of the last hearing before the Deputy Commissioner. I knew Michael Miramontez had been contacted prior to that hearing and a statement had been taken from him but it had not been transcribed as of the date of that hearing in June of 1961. I had a resume' of that statement. The resume' said that he
124 reported a rope falling but that this was completely unconfirmed and was not believable because he reported it as happening after the day's work had been completed that day.

Permission to give cross examination testimony in narrative form granted by the Deputy Commissioner.

Mr. Braun: At the time claimant's Exhibit 9, the statement was taken on April 8, a series of other

statements were also taken from men who worked at the Norris Elevator on January 30th. Not one of the other workers present could confirm that any rope had broken or any incident had occurred on that day and in the opinion of the investigators, the comment of Mr. Miramontez that a rope had broken was strictly a second thought on his part and as a matter of fact he indicated that an occurrence took place at a time after all of the men had left the job.

126 This statement was produced in the Federal District Court in Chicago in response to subpoena. We opposed the subpoena and went before Judge Robson. Mr. Liebenson represented that he was entitled to this statement on a discovery basis and further represented to the court that if any recovery were made in the Federal Court proceedings that the Longshoremen's case would be dismissed and, therefore, the court directed that the statement be produced as it could not prejudice the employer.

It further appeared that the statement was not required as this witness had been in Mr. Liebenson's office prior to the time the statement was requested.

At the time this statement was taken, a series of other statements were taken from company employees and none of these confirm any part of this statement and I would like to make all of those statements available to the Commissioner.

127 *Redirect Examination by Mr. Liebenson.*

From our information, the witness in the statement said the incident took place when no men were present on the scene. The statement in the exhibit refers to the fact that it occurred at 2:30 P.M. and

we have evidence that no one worked after 2:00 P.M. at this place.

128 Claimant's Exhibit 9 offered in evidence. Objections were raised. Claimant's Exhibit 9 received in evidence.

133 Mr. Braun: A certain statement was introduced by claimant and other statements were offered that were taken at the same time and I would like to ask whether they will be received.

Deputy Commissioner Enos: They will not be received unless the persons making the statements are brought in and made available for cross examination.

October 1, 1963.

138 DR. I. JOSHUA SPEIGEL, Witness for Claimant, testified:

Direct Examination by Mr. Liebenson.

My name is I. Joshua Speigel. I am the physician duly licensed to practice medicine in the State of
139 Illinois in 1942. I am a graduate of the University of Toronto School of Medicine, 1937.

Mr. Braun: It can be agreed that Dr. Speigel is a licensed and qualified neurosurgeon and a Board member.

The Witness: I perform about 300 operations a year, 2 a working day. On February 1, 1961, I say John Banks professionally at the South Chicago Community Hospital. I examined Mr. Banks and found that he was paralyzed on the right side and in addi-
140 tion was aphasic; he could not speak; spinal puncture revealed normally clear and colorless spinal fluid was grossly bloody, indicating there was bleeding from

the brain; spinal pressure fluid was 300, that was all my examination revealed.

300 pressure spinal fluid meant the brain was swollen and also that the blood pouring out of the brain is increasing the contents of the cranial cavity.

I never got a history from this patient.

A hypothetical question propounded by Mr. Liebenson.

Q. Assume that a man 49 years of age, and height about five feet ten and a half, weight 175 pounds, was working as a grain trimmer for many years; had not been under the care of a physician for at least three years; that on January 30, 1961, was working on the edge of a barge with his back to a tower, and looking and facing into the barge; that he started to work at approximately 10:00 AM, in the morning; that at about 2:10 to 2:30 in the after-
141 noon while he was working, had a sort of a railroad worker's cap on, a one inch thick hemp rope weighing approximately 20 pounds fell from a height of approximately 50 feet, hitting him on the top of the head, and causing him to go down and forward, and grabbing onto the edge of the barge where he was standing; that he picked himself up and rubbed his head a number of times, looked like he was in pain for a period of approximately 30 minutes, and a short time thereafter left his work and went with a friend to a tavern about five blocks away, where he had two beers; that he then came home and was not intoxicated, and his friend came home with him; that he picked up his grandchild and went down into the basement where his wife was working, was there

a few minutes having a conversation with his wife and his friend, and then carried the grandchild upstairs, went into the kitchen, and his wife came up and went in, too, and then she went downstairs, and a few minutes later while the wife was in the basement the hypothetical person came to the top of a stairway which consisted of eleven stairs which had walls on each side of it going down at least four stairs, and from there on there was a bannister which went all the way down to the bottom of the stairs, which was a cement area. Assume further, Doctor, that the hypothetical man standing at the top of the
142 stairs said, "I want to talk to you," and then she walked over there, and while standing there, with his arms at his side, he suddenly fell in a forward position straight out, landing at the bottom of the stairs, and at no time during his fall did his hands or body do anything to protect itself. Assume further that this party remained in an unconscious or sleeping position, and was removed to the South Chicago Hospital where he came under the care of a physician. Assume further that this hypothetical person never fully regained consciousness from the time he was at the top of the stairs until his death some 13 or 14 days later. Assume further that a neurological surgeon was called in and examined him approximately one day later that this examination revealed—a paralysis on the right side of his body and a partially aphasic condition. Assume testing of the spinal fluid revealed that the pressure was twice the normal amount; that the pressure was approximately 300 centimeters, or listed at 300, and the spinal fluid was grossly bloody. Assume further that after this

man passed away, the Cook County Coroner's physician did an autopsy and filed a protocol in which he found an obliteration of the right nasolabial fold; incised wound one-eighth inch long over the right parietal region; an area of depression of scalp about three-eights of an inch in diameter over the right parietal region; large hematoma below scalp about
143 one and one-half inches in diameter in right parietal region extending to the calvarium; small puncture wound over left parietal region, a healed injury; massive subdural hemorrhage extending over entire left cerebral hemisphere; basal skull fracture extending from right parietal region to the cribiform plate of ethmoid bones; fracture through the posterior plate of hypophysis; that blood was found in the ventricles of the brain.

Now, Doctor, assuming all these facts, do you have an opinion based upon a reasonable degree of medical and surgical certainty as to whether or not there is a causal relation between the striking of the man's head with the 20 pounds of rope in the hypothetical question, and the fall down the stairs at his home some two hours later?

Mr. Braun: There are some objections. I think the evidence here is that he had a heavy woolen cap with earflaps. Mr. Liebenson (to the witness)

Q. Will you add that?

Mr. Braun: The evidence does not show any 20 pounds of rope nor does it show that it was a length of 50 feet. We think the evidence shows that no one saw it fall.

144-149 Commissioner: "I agree with you, they said the
145 rope was on and around him, as I recall."

146 "The weight of it is an estimate, in any event, and whether it weighed 10 pounds or whether it weighed 20 or 30 pounds, I do not think anybody can say unless you go out and weigh."

149 Deputy Commissioner Enos: We are wasting time here as far as I'm concerned. The rope fell, and it fell on Mr. Banks according to the testimony, so go ahead with your questions.

Mr. Braun: I have one further objection. That is the comment in the question that he had pain for a half hour.

150 Mr. Liebenson: (Reading from the record from the testimony of Mr. Miramontez) "I had a chance to see Johnny Banks after this for 25 or 30 minutes. He was keeping, you know, rubbing his head and then feeling his head and after that he went to work."

Deputy Commissioner Enos: (To the witness) Go ahead.

The Witness, Dr. Speigel: I have an opinion.

It is my opinion that the blow that the hypothet ical patient received from this mass of coiled rope caused him to lose consciousness just before he fell from the top of the steps.

Q. Some two hours later, is that correct?

151 A. Some two hours later.

Q. Will you give us the reasons for the opinion?

A. He was, apparently, perfectly normal up until the time he was injured. He had 2 beers, which apparently did not make him intoxicated. He came to the foot of the steps and suddenly fell. It was clear from your description of the fall he had to be unconscious when he fell. The reason for that is he

wasn't protecting himself as an ordinary fall, he would have certainly made some attempt to do so. The second reason, he was standing. He wasn't moving. One cannot slip or trip unless he moves. From your story, he was going to deliver a verbal message to his wife from the top of the steps, otherwise he would have started down. That is all.

The cause for his passing out at the top of the steps would be either epilepsy which he apparently did not have or was not reported or acute subdural hematoma. An acute subdural hematoma is bleeding from one of the large venous sinuses or veins outside of the brain underneath the dura, but not
152 into the brain. It is one of the deadly lesions as opposed to chronic subdural hematoma, which is slight bleeding, and then an enlargement of the hematoma by an osmotic process. This is not a deadly lesion if taken in time.

In this area of the skull the vessels are of various sizes. The period of 2 hours is of significance. This caused the lucid or latent interval, the size of the hematoma. In other words, the brain has a certain degree of compensatory power and in spite of the fact that—that is between the brain and the dura —this deal is going on, the patient proceeds normally until his compensatory powers are past, and suddenly, like the first drop flowing over the dam, they become unconscious or paralyzed, or both. It was a classical case of subdural hematoma.

153 The type of blow, severity has no significance to a subdural hematoma, an acute subdural hematoma.

154 *Cross Examination by Mr. Braun.*

I saw Mr. Banks in the South Chicago Community Hospital on the 1st of February and on the 5th of May. No, no, I only saw him once. Actually, it was on the 3rd of February and prior to that time, he had been seen by my associate, Dr. Tinsley. When
155 I saw him, the significant findings were three; elevated blood pressure and the gross of blood in the canal, hemiplegia and aphasia. Of the list of things in the hypothetical question that were found by the Coroner, it is correct that the first, the obliteration of the right nasolabial fold, is of no significance.
156 The finding of a one-eighth inch long wound over the right parietal area is consistent with the fall down the stairs and it is exterior.

The area of depression of the scalp, three-eighths inch in diameter is also consistent with a man falling
157 down the stairway and the large hematoma, one and one-half inches in diameter in the right parietal region is consistent with the injury of falling down the stairs.

The small puncture wound in the left parietal region was a healed wound and I had no opinion regarding it.

The massive subdural hemorrhage extending over the entire left cerebral hemisphere could result from the fall down the stairs and the basal skull fracture would also result from the fall down the stairs. The
158 fracture through the posterior plate is consistent with the fall down the stairs.

With that type of trauma, you could obtain intra cranial injury that would result in blood going into the ventricles.

Q. So that all of the findings could have resulted from the trauma to the head on the concrete floor.

A. That is a correct statement.

It is a good question as to what caused the death, whether it was one of these or a combination of these. In trauma in particular, hemorrhage is a frequent cause of death, but it causes death, in general, more rapidly than this man's death eventuated in; he lived for 14 days following whichever trauma you are incriminating.

159 Acute subdural hematoma would be the more likely cause of death. In the classic subdural hematoma, death would result in 4 to 5 days. Generally, that is true. The fact that Mr. Banks lived for 14 days could not indicate that his subdural was not acute but chronic. The chronic subdural, the fluid is much lighter than this blood clot he described; a straight subdural hematoma. The acute, the term "acute" is descriptive, particularly of the latent interval, the lucid interval, the interval between whatever injury caused it and the development of coma. That is what gives the criterion to the term "chronic" or "acute".

160 In the acute situation, it is possible that the man would be unconscious from the moment of the trauma. In the acute, the injury has to be quite direct and may be frequently sufficiently severe to cause the patient to be unconscious, to separate items. When you have an acute you have frequently an immediate unconsciousness. In the chronic subdural, you frequently find no symptoms at all for periods of two to three weeks. That would be a classic picture of the chronic subdural.

I recall testifying in a case in the Federal Court involving the death of John Banks. I answered a
161 hypothetical question in that case almost identical to the one given to me today, including a history of a rope falling on him. I was cross examined by an attorney named Griffin.

Q. Do you recall this question, Doctor Speigel?

"Question: So you would say that he did not have an acute subdural episode?"

"Answer: No, he didn't."

A. May I read the context of this?

Q. We are asking at this point whether you recall that question being given to you, and you making that answer?

A. I don't recall it, but if you allow me to refresh my memory—yes.

Q. That was given to you and you gave that answer?

A. That is correct, Mr. Braun.

Q. And subsequently this question was asked:

"Question: You are saying that the kind of
162 subdural hematoma that he had was a chronic one?"

"Answer: He eventually died from that, yes."

A. That is correct. It says so here.

Q. So at that time you testified it was chronic, and now it is your opinion that it was acute, is that right?

A. Yes.

The Witness: In the acute situation, the man may become unconscious almost immediately. It is quite common and in the chronic subdural symptoms, what-

ever they may be, take weeks or usually take many weeks, sometimes days, but mostly weeks.

I recall testifying before Commissioner Enos some two years ago in June of 1961 with reference to the death of John Banks. At that time, I answered a
163 hypothetical question with reference to this patient indicating that I felt his fall down the steps was related to an incident of January 26.

It is correct that my partner on first seeing Mr. Banks in the hospital, the South Chicago Community Hospital, on January 30, 1961 made a diagnosis of his condition being due to alcoholism with a cerebral vascular accident.

When a cerebral vascular accident occurs, it will cause sudden unconsciousness. In a CVA you have sudden bleeding in the brain and this will cause blood
164 to be in the ventricles. I saw Mr. Banks 3 or 4 days later, about February 4, and made a comment in the same record that there was a history of cranial cerebral injury. Three days prior to the "cerebral vascular accident".

165 I have stated that a number of things may cause a man to become suddenly unconscious. One is epilepsy. Cerebral Vascular Accident is another. There could be a host of things. I don't think lack of nourishment or fatigue could cause a man to be suddenly unconsciousness. He might gradually lapse into a coma. This fella just had two bottles of beer. That would keep a man going. People do faint from lack of nourishment.

167 Q. Were you aware that the treating physician in this particular case at the hospital—at least you and your partner, your office, in consultation, made a final

diagnosis after death in the hospital record of cerebral vascular accident, and the record was signed and closed in that manner?

A. Well, he has the same right to error as has my partner.

The Witness: In giving the answer to the hypothetical question today, it was important and significant that the question stated the weight of the rope that struck the skull was 20 pounds. If a wisp of wrapping string hit him on the head, it would be another, particularly with the woolen cap he was wearing, but 20 pounds, if it's coiled up as the hypothetical said, and fell 50 feet, accelerating, and I have forgotten my physics, but accelerating considerably over the fall, then it would be a substantial knock.

168 It would be fair to say that if that fact were not in the hypothetical, and the weight and amount were substantially reduced, my answer might indeed be different. It was also important in my opinion that the man stiffened before he fell and did not attempt to protect himself. In my testimony I made refer-

169 ence to the mechanics of body motion—that a body in motion tends to stay in motion. I would say that if a man is able to fall to the foot of the steps without touching the steps, he would have to run at all

170 his speed like a broad jumper and not land on his head. If he were conscious; not land on his head, but on his feet. I was just picturing it. Am I understanding you correctly that man is in motion, the motion does cease, and he falls to the foot of the steps and lands on his head? I do not think any-

171 body conscious would ever do that. If he ever did it, he would have to take a running jump.

Q. I am asking you with a man, say unconscious, he would have to be in motion to do this, would he not, to fall all the way down?

A. No.

The Witness: If he falls down, gravity may or may not take him. If the physics are such, the body falls and the body catches on one of the steps, he may not fall further, but under normal circumstances an unconscious person lying supine or prone in the axis of the steps will fall down onto the steps and onto the floor. He would fall onto the steps immediately below him.

It is also true when a person becomes suddenly unconscious they frequently slump to the floor and I agree that a body at rest would tend to stay at rest.

172 Q. So, if it was at rest and it became unconscious, it would slump to the floor.

A. That is right. If the axis of the floor were in any way directed towards the steps. The moment the axis of the fall directs the falling body toward the step, we now have reached a point where the body is overbalancing into the downward force of gravity.

Q. Onto the steps immediately below?

A. Yes.

In the acute subdural hematoma there would be fairly rapid bleeding into the subdural space. That would be a rapid accumulation of pressure, and you would not have the osmosis process we previously talked about. It is too fast.

173 When you have the sudden accumulation of blood in the subdural space, this could cause headache immediately. It would not necessarily cause a loss of coordination or reflex change. It might cause imme-

diate unconsciousness. It is quite consistent but not mandatory with the occurrence of an acute subdural hematoma. It is acceptable.

Redirect Examination by Mr. Liebenson.

174 I was asked about my partner's diagnosis about alcoholism in the record. I thought alcohol had nothing to do with it. My partner said that the diagnosis was alcoholism and cerebral vascular accident. He had neither CVA nor did he show evidence of alcoholism. That will be shown in the Protocol. They sliced the brain all the way down. There was no cerebral vascular accident. Evidence of alcoholism would show in the liver.

175 I have no knowledge as to whether this man was hurt personally on the 26th or he was hurt on the 30th. My answers were based on the facts in the hypothetical question. That's all I can base them on.

Q. Now counsel asked you about this record, where you said something about the death of the individual was caused by a chronic subdural hematoma. I show you Page 86, and ask you whether or not you testified that the occurrence here was an acute subdural hematoma, but that the death was caused by a chronic—

A. That is correct.

The Witness: I never received a history of eli-
176 lepsy here. Immediate unconsciousness is not the necessary element of an acute subdural hematoma.

177 *Recross Examination by Mr. Braun.*

178 I was not given any findings with a reference to the autopsy of this man. I do not know whether there was any finding on examination of his heart,

whether he had an occlusion or he did not have one and I never got a personal history from anybody in this case. My partner took that history from the
179 family. I don't know precisely what was told to my partner. He normally makes an accurate notation on what is told him.

180 In the classic acute subdural hematoma, you could have immediate unconsciousness.

Deputy Commissioner Enos: Just a minute, Doc-
181 tor. I want to clarify something here on that hypothetical question that Mr. Liebenson asked you. I would like to change those facts a little bit, and ask you to make the hypothetical question instead of a coil of rope coming down and striking this man on the head, if it was a single strand of one inch rope falling a distance of say 50 feet, and striking him on the head, would that change your opinion in the case?

The Witness: I wouldn't have the right to answer that question because I have never seen a rope fall straight down and fall as if there was a tail at the end of it, heavy part at the bottom.

Deputy Commissioner Enos: I think you would have to do like any of us would have to do, visualize that.

182 The Witness: The visualizing is as follows: The rope has to coil when it falls. It cannot fall as a single, sinuous item.

Deputy Commissioner Enos: It will coil to some extent. There is no question about that. Anyone who is acquainted with ropes knows that will happen, but what I am trying to inquire of you, I am trying to get your opinion that if this rope fell down and

just, say, a single strand of it hit him on the head, would that change—

The Witness: The single strand couldn't do a thing to him, but as soon as the deceleration occurs on the bottom, this hypothetical single strand, it will almost accumulate down quickly.

Deputy Commissioner Enos: The testimony is that this gentleman came to the top of the stairs and he pitched forward, and went down the stairs, not touching the stairs with any part of his body; that he fell, struck his head on the concrete floor below. I
183 would like to know whether or not from a medical standpoint that sort of thing is practical?

The Witness: It's impractical. It's impossible not to touch the steps, because the hypothetical describes two walls, so he couldn't fall down the stairwell. He had to fall forward down the continuity of steps.

Q. There was a set of 11 steps there.

A. He would have to fall forward.

Q. The testimony is that he pitched forward down those steps, and no part of his body touched those steps as he went down.

A. I do not see how that is possible, unless as I told Mr. Braun, he took a running start. To clear the steps would be—if the step was 10 inches, 110 inches, it would almost be 10 feet.

Q. Do you know of any medical—anything in the medical literature that would account for anything like that?

A. No, sir. He couldn't clear 10 feet. It is approximately 10 feet. I just figured it out, 11 steps, and if he is falling down like this (indicating), if he is falling even just like this (indicating), as he fell

he has to fall on the steps. Ten feet is a respectable broad jump. Here is 10 feet, from here (indicating) to here.

184 Q. You could not explain that from a medical standpoint, how a man could pitch forward and clear the entire steps, land on his—

A. There are some rare diseases, like tetanus, certain poisons, where the muscles go into tremendous contractions, and in fact that is what kills the patient.

Q. You did testify, did you not, Doctor, that in your opinion the cause of this man falling was loss of consciousness by reason of an acute subdural hematoma?

A. I did, yes, sir.

Q. What would be the natural reaction?

A. Just a fall—

Q. Would he have a tendency to slump?

A. He could slump.

Q. And tumble down the stairs?

A. Yes, he could.

Q. I presume if he was unconscious when he started, that that would account for the fact that he did not use his arms to protect himself in any way going down?

A. That is a proper assumption. He could fall straight. He wouldn't of necessity have to slump down into a huddle. He could fall straight down and continue falling, but he would have to hit the steps.

185 Claimant has rested.

MR. JAMES HILLARY WHALEN, Witness for the carrier, testified:

Direct Examination by Mr. Braun.

My name is Hillary Whalen. I work part time as a grain trimmer and I have done this work for a number of years. I had known John Banks for 10 or 12 years and I worked with him on January 30, 1961. I worked on the same job with him at Norris
187 Elevator, 98th and River in Chicago. We started about 10:00 AM that morning. We worked unloading the same barge that day. There was just one barge being unloaded there that day. We finished our work at about 2:30 or quarter to three in the afternoon. During the time we worked that day, I did not see
188 anything unusual happen to John Banks. He made no complaint to me during that day and I left the premises with him at about 2:30 or 3:00 PM. We walked over to my car and Mr. Banks rode with me. We stopped at 103rd and Avenue M at a tavern. We
189 had a few drinks and then I had to go home. Both Mr. Banks and I drank beer. I don't remember how many we had.

Q. Can you give us an estimate. Was it more than 5?

A. No, I don't think it was more than 5; between 2 and 3 and 4 because we wasn't in there that long.

The Witness: I went into his home with him after
190 that and we visited with his wife. We went to the basement to see "Ag". While there, we had another can of beer. We didn't drink it all. We just opened it up. I was there about 20 minutes—20-25 minutes. During the time that I was with John Banks after

we left Norris Grain Elevator that day, he did not make any complaint about feeling bad in any way. He made no complaint about feeling bad or anything to me. He made no comment to me about being injured that day and he made no comment to me about
191 being struck by anything.

Cross Examination by Mr. Liebenson.

When I worked at Norris on the 30th, I worked at the bottom of the barge. John Banks was not my tripper and if anything happened to John Banks and his rope, that would not affect mine. I would still be working. My job is to work in the bottom to bring the grain in. About the question, it could not have been that we had only 2 beers that day. We had more than 2. I bought one. He bought one. The
192 house bought one. In April, 1961, somebody came out from New Amsterdam and took a statement from me. My mind would be fresher back in '61. In that statement, I said we stopped for a couple of beers and the kid drove us home. It was about 4:00 o'clock
193 when I left Mr. Banks. It was a little before 4:00 and he was not intoxicated.

Redirect Examination by Mr. Braun.

When I say a couple, I do not always mean 2—just a few. When I am working down in a barge and one of the shovels breaks down for any reason, we
194 are frequently aware of it. Yes. If you are down for a half hour, you'd know that. I do not remember one shovel being down that afternoon.

Recross Examination by Mr. Liebenson.

I didn't say a shovel was down for a half hour because you very seldom see a shovel down for a
195 half hour. You know when another shovel is down. You can tell sometimes if its on the same side as you but you don't pay no attention. John Banks was not on my shovel that day. I don't pay attention or have any knowledge whatsoever as to what took place on John's shovel. If one of the other shovels stops working, you could tell but you don't pay no attention to it.

196 Deputy Commissioner Enos: Q. You do not know whether a rope broke on the other shovel, the shovel Mr. Banks was working on, or not, do you?

A. No, sir, I don't.

197 *Afternoon Session.*

DR. ERIC OLDBERG, Witness for carrier, Testified:

Direct Examination by Mr. Braun.

My name is Eric Oldberg. I am a physician and surgeon.

Mr. Liebenson: I will stipulate for the record as to the doctor's qualifications as a specialist in neurosurgery.

Mr. Braun: Dr. Oldberg, I will ask you to assume that on January 30, 1961, the hypothetical individual was 49 years of age; that his height was about five feet ten and one-half inches; that he weighed 175 pounds; that on that date he was working as a grain trimmer, which had been his occupation for many

years prior thereto; that in the morning he had
198 worked as a grain trimmer, and that at 2:00 or 2:30 in the afternoon while working as a grain trimmer, a rope that was stretched above him parted, and that a portion of this rope fell and was seen thereafter to be about his head and some about his shoulders; that at the time of this incident he was wearing a heavy, woolen cap with ear flaps; that the rope in question was one inch thick, and a co-worker estimated that it might have weighed 20 pounds in total; that after the rope fell, he was seen to have leaned forward against a hatch cover which was approximately chest high to him, and that he leaned forward on this with both hands, and that thereafter, he rubbed his head and stated that it hurt; that 30 minutes thereafter he resumed work, the 30 minute delay being due to the repair of the rope, and that he continued to work for approximately an hour, when the job was completed for that day; that he then left the site of his employment with a co-employee, and went to a local tavern, and that he had what was termed as a couple of beers, which could have been two, three or four; that he was then driven to his home where another can of beer was opened for himself and for his friend, and that he carried his grandchild into the basement, spoke with his wife, carried the grandchild back upstairs, and shortly thereafter, at about 4:15 PM, or slightly later, he was heard to call from the head of the basement stairs to his wife, "I want to talk with you," and immediately thereafter his wife testified that she saw his arms suddenly stiffen at his side, and he pitched forward down the stairs without touching the stair-

way, striking his head on the concrete floor; that he remained unconscious after this fall, was removed to the South Chicago Community Hospital, and that day he was seen by the family physician and also by a neurosurgeon, and it was determined that his spinal fluid was bloody and that the spinal fluid pressure was 300 millimeters; that he had a right hemiplegia and partly asphasic; that he remained in the hospital from the 30th day of January until February 12th, the day that he died; that he never regained full consciousness; that a coroner's physician performed an autopsy and it was found and reported by the coroner that he had an obliteration of the right nasolabial fold, an incised wound one-eighth inches long over the right parietal region, an area of depression of scalp about three-eighths of an inch diameter over the right parietal region; that he had a large hematoma below scalp about one and one-half inches in diameter in right parietal region extending to the calvarium, a small puncture wound over left parietal region, healed injury, and massive subdural hemorrhage extending over entire left cerebral hemisphere, a basal skull fracture extending from right parietal
200 region to the plate of ethmoid bones, and there was blood in the ventricles of the brain.

Now Doctor, assuming the facts in this hypothetical to be true do you have an opinion based upon a reasonable degree of medical certainty in your experience, as to whether or not there was a relationship between this rope falling incident described in the hypothetical question and the fall down the stairs?

200-202 Objections raised to stated weight with reference to the rope.

The Deputy Commissioner: The off the record discussion was with reference to the weight and length of the rope which broke and fell and the hypothetical question has been amended to include—

Mr. Braun: We are asking to amend the hypothetical question. I will ask the Doctor to assume that the rope in question stretched from a point in a barge that was directly in front of the hypothetical individual, and that it stretched at an angle from that point to a point approximately 50 feet above
203 the dock on which the hypothetical man was standing; that the rope was heard to part, and co-workers said they felt it parted near the top, and estimated that the weight was approximately 20 to 30 pounds.

Objection that hypothetical did not include that the entire 50 feet of rope was on top of his head.

204 Deputy Commissioner Enos: It would be impossible for a falling rope to coil in a tight ball.

205 Objection to his prior physical health.

Mr. Braun: Yes, the only thing in this record being he had complained of headaches on one occasion the preceding weekend, and he did not ask for his lunch to be packed. That is the only evidence in this record of improper health. The man, according to the testimony, had not had medical care for some three years prior to this occasion.

206 Deputy Commissioner Enos: In view of the discussion regarding the rope, I would say that the hypothetical question should state that the falling rope, approximately 50 feet of it, fell and struck the hypothetical man on the head and shoulders. No one is in a position to say how much struck the head—how much struck the shoulders.

208 Mr. Braun: Let us amend and say forward and down to the extent that his hands came to rest on the hatch cover that was approximately chest height.

209 Hypothetical question amended to state that the person drinking with him stated that he was not intoxicated.

Mr. Braun: Doctor, would you consider that the hypothetical question with the amendments you have heard? Do you have an opinion as to whether or not the incident described caused this man to pitch down the stairs some two to two and one-half hours later?

210 The Witness: I do.

My opinion is that I see no connection.

Q. Will you describe the reasons for your opinion, Doctor.

A. Yes. They have described to me a probably healthy man, apparently, who was working, and who was struck by a rope which detached itself from 50 feet above his head, might have weighed 20, 30 pounds, then collapsed down about his head and shoulders, which has sufficient weight so that he apparently went forward somewhat, and caught himself on top of the hatch cover, and who rubbed his head for a considerable period of time, and evidently was not unconscious, and when the rope had been repaired, which took close to half an hour, he and his colleague went to work again and worked for about an hour. He then apparently—there is nothing given to me saying he had any particular complaints when he returned to work, and he had a beer or two or three, whichever it was, in the tavern on the way home, and another can of beer when he got home, and behaved normally, and in fact invited his friend into the house for a can of beer. He then carried his

grandchild down to the basement, and carried her
211 back upstairs again, and then shortly thereafter, maybe a couple of hours after the original fall of this rope, and while standing at the top of the stairs he called to his wife, and she saw him just in time to see him stiffen up a little bit and pitch forward down the basement steps. Now, there is no way that I can correct anything that could have happened two hours before that would give a latent period of complete well being except for the rubbing of the top of the head, the scalp, which is the only part of the head which has any sensation, and then all of the subsequent events, and then a sudden catastrophic thing that precipitated this man down a flight of stairs. I cannot connect the two by anything that I know of as far as the mechanism of the brain is concerned. If brain damage had been the result, or anything around the brain had been the result of this rope falling, then I would expect a march of events that might have ended in unconsciousness or something of that sort, but I cannot speak nor can I explain on any reasonable grounds why for a couple of hours everything was fine, and all of a sudden, almost instantaneously, the man evidently loses consciousness or trips, whatever happened to him, and down he goes down a flight of steps to the concrete basement floor. That just does not happen, in my experience anyway; no connection between the two
212 from a medical standpoint. It could happen with other things, heart attacks, anything else that might send a man down the stairs, but I cannot connect it with the rope collapsing on the man's head.

213 I have considered the findings of the coroner. In my opinion, all of those findings are ascribable to

the fall down the steps on the concrete, which resulted in death in two weeks. This includes the scalp injuries, the hematoma under the scalp, one penetrating wound an eighth of an inch long, and another one was supposed to be healed, a fracture on the base of the skull, a massive subdural hematoma, all of which are attributable to what happened to the man when he fell down the stairs. The massive subdural hematoma is consistent with the trauma at the basement floor. The finding of increased spinal pressure, the blood in the spinal fluid, aphasia, hemiplegia are all consistent with the fall on the floor.

214 *Cross Examination by Mr. Liebenson.*

The Witness: Medicine is a science but it is not mathematically exact. Considering all the findings of the pathologist, I would think there was damage to
215 the whole brain and the findings described with reference to the right side could be caused by the fall with the head striking the cement floor.

216 With reference to the small puncture wound over the left parietal region, healed injury and a massive subdural hematoma extending over the entire left
217 cerebral hemisphere, I am answering on an entirely academic basis as to whether they might or could come from another blow. In the first place, the external wound was healed and, therefore, it probably came from some previous episode of some kind. As far as the subdural hematoma is concerned, again, this is strictly academic, of course, it is possible for a man with a chronic subdural hematoma to fall down and fracture his skull on the other side of his head,

and the previous—some previous injury might have produced a chronic subdural hematoma, so that, from an academic standpoint, of course, it is possible, just as it is possible for me to have a coronary disease
218 and break my leg. With reference to his falling down the stairs, although I did not see him and this is only hearsay, if he did nothing to protect himself, I think he was more likely to be unconscious than conscious. At least people throw out their arms to protect themselves, but I didn't see him fall, of course.
219 The skull has things that are called diploe. They are spaces which contain blood, and there is always an arterial circulation in the skull. All through the body are vessels of various sizes, including the head. It is not true that an intermediate blow causes bleeding
220 in the skull rather than a very severe one. In general you would simply say that a more severe blow to any part of the body, the more severe the damage could be done. I mean that's academic.

A hematoma is a collection of blood. It means tumor
221 of the blood, is what it actually means. A hematoma inside the skull pressing the brain can cause unconsciousness.

Redirect Examination by Mr. Braun.

I have an opinion based upon the hypothetical situation here, including the rope incident and all the other activity of this man in the hypothetical as to whether there is any evidence of a trauma such as to cause a massive subdural hematoma. My opinion
222 is that the subdural hematoma described in the autopsy, the protocol of this man, had nothing to do with the rope falling on his head. I think it was entirely the result of the fall down the stairs.

223 The trauma to the right side of the head entirely and the subdural hematoma are all entirely consistent with having fallen down the stairs. Chronic subdural hematoma, especially a massive one, takes time to develop. This man had two weeks for that to develop after he fell down the stairs, and finally died. In my opinion, the trauma down the stairs did produce the massive subdural hematoma. At the time counsel showed me a portion of a previous transcript, I was discussing the formation of a chronic subdural hematoma, how they form. That statement that was read does not in any way contradict the opinion I have just given.

224 MR. ROBERT R. OLSTER, Witness for the carrier, Testified:

Direct Examination by Mr. Braun.

My name is Robert Olster. I live in Burnham, Illinois and am employed by the Falstaff Brewing Corporation. I also work part time as a grain trimmer. I do this work for the Chicago Grain Trimmers Association and have done it for about 15 years. In the course of doing that work I knew John Banks.
225 I worked with John Banks on the last day he worked, January 30, 1961 at Norris Grain Elevator in Chicago.

We started working at 10:00 AM and I was pulling rope. That means that after the shovel stopped, I pulled it out of the tower or the house to create slack. John Banks was tripping in the rope that I was pulling. During the day of January 30, I did
226 not see a rope fall and hit John Banks at any time and I do not recall having a broken rope that day. I do not recall that that shovel was stopped or down

for a half an hour on that day but I know there has been times when they had a little trouble with that shovel. The trouble was not due to a breaking rope.

During the time I worked with John Banks on the 30th, he made no complaints to me about being struck by a rope or about feeling ill.

Cross Examination by Mr. Liebenson.

227 It was well after the death of John Banks before I was contacted regarding any occurrence of January 30, 1961. I don't remember who contacted me but I made a statement to him. I was contacted by a man that had a stenographer with him and I'd say it was within a short time after John died. I
228 remember the day I worked with him. I don't remember if it was the last day in January or the 25th but I know the last day that I worked with him at the elevator. I don't know when it was that I worked with him prior to January 30. I didn't work too much with him because usually at that time of the year the river is slow and me just being a part time worker and if they didn't have one job I never worked because the regulars worked and John was always number one man on the river and he was on that job all the time. I recall that day I worked with John.

229 In the Fall of the year when the grain was really running, I worked not too often with him. He was top man on the river and he was on the job all the time and if there was a long job, naturally he was on there and me being a part time worker, I wouldn't be on that job. On that date pulling rope was to

my knowledge Ed Wagner and Miramontez was there and McAndrews.

During the day, some of the fellas go into the warming house. The shovelers do because they shovel one hatch and rest the other hatch but the rope pullers don't. They pull the rope every hatch unless you might happen to have two of the shovelers in the hole shoveling on the same shovel, and you'd work it three ways. I don't remember whether I
230 went into the warming house that day. I might have.

Mr. Braun: Objection.

Objection overruled.

The Witness: I don't remember if it snowed that day and I don't remember the temperature but I remember that we quit between 2:30 and 3:00. I did not get that from Mr. Braun.

231 Q. Isn't that a little earlier hour than you usually work?

The Witness: For a part time worker, you might go out there and work 2 hours and you are guaranteed, or you might go out and work four or five, five and a half hours, or nine, ten or twelve hours.

The only record that I know of that I worked that day would be Mr. Grennan. He has the time slips.

I remember that day I quit at 2:30 PM. It was at a little earlier hour than usual. I was a part
232 time worker. I worked regular at Fallstaff, and I was working steady four to twelve then and when I got called like that, I would ask Huey about how long it would be. I'd take extra close and I would change into clean close at the elevator and then go to work and stop for a sandwich or so if it was before my starting time on my regular job.

On that day, the only thing I could say is that in between hatches while they are shifting or dipping the barges, we would go into the warming houses and warm up and when they were ready to go to work, somebody would holler and we'd go out and start. On that day I can't recall any specific time
233 that I went into the warming house. I couldn't say that I did get a spell because I don't remember if I did or not.

Redirect Examination by Mr. Braun.

The Witness: When they are shifting hatches, both the puller and the tripper are free to go into the warming house. When they are shifting hatches, neither the tripper nor the puller are doing their job. They are doing nothing. The man that was running the job would be John Banks.

234 In answer to the Commissioner's question the witness stated:

Yes sir, that no rope broke that day and he was the puller for John Banks. He was working in close
235 connection with him. I was there during the entire work that was accomplished that particular day and I do not remember whether a rope broke or not.

Witness excused.

HUEY GRENNAN, Witness for the carrier, testified:

Direct Examination by Mr. Braun.

236 My name is Hugh J. Grennan. I'm employed by the Chicago Grain Trimmers Association and was so employed on January 30, 1961. I am what they call

the dispatcher. I dispatch the men out to work. In the office, I keep track of the time. I get the information from the superintendent of the grain elevator or of the grain company itself and I did make a record of the time worked by the grain trimmers on January 30, 1961.

237 As a part of my duty, I assign the trimmers to various locations at which they are to work. On the morning of January 30, 1961, I assigned John Banks to the Calumet Elevator. That assignment lasted approximately a half an hour. After that, I assigned him to Norris Grain Elevator to start at 10:00 AM. Other men were assigned to Norris as the first place they worked that day. The other men

238 that were assigned to start at Norris at 10:00 AM were Miramontez, Thomas Banks, James Whalen, Jr., James Whalen, Sr., Augustine Artega, Robert Olster, Victor Markowski, Edward Koziera and a man by the name of Munguia. This Robert Olster was the man I just saw leaving here.

The crew at Norris, according to our records, worked from 10:00 o'clock in the morning to 2:00. I keep the time and my record shows from 10:00 AM to 2:45 PM. I got the information from the man who handled the job who was John Banks.

239 It is correct that in turning in the time it is rounded off to the nearest quarter hour so that they stopped working sometime between 2:30 and 2:45. There were other men that finished there that day at Norris. The names I gave were simply those that were called out at 10:00 AM.

Cross Examination by Mr. Liebenson.

The Witness: I did not see John Banks on the 30th of January. I did talk to John on the phone. He reported into his office. The information with
240 respect to the time came from Mr. Banks.

Witness excused.

JOHN GOETZINGER, Witness for the carrier, testified:

Direct Examination by Mr. Braun.

On January 30, 1961, I was employed with the Norris Grain Company at the elevator at 98th Street. That would be 98th and Calumet River. My position
241 was that of an electrician. I worked round or about the marine leg in the tower when that piece of equipment was being used to unload a barge.

There were no records kept by Norris Grain as to the activity of the marine leg or the barge. There were no records kept to my knowledge as to the time or day when a rope would be changed on the marine leg. No records were kept as to whether or not a
242 particular shovel might have been incapacitated or not operating for a certain length of time on a certain day. There were no records to confirm or deny whether a rope broke on January 30.

Cross Examination by Mr. Liebenson.

I wouldn't want to say it was a common occurrence that ropes would break. I don't know or remember any one particular day of ropes breaking. If you got it recorded there, I must have said it was a common occurrence as far as ropes breaking.

244 Deputy Commissioner Enos: What he said was, as far as I can recall, ropes break. He wouldn't say it was a common occurrence, and there he said it was a common occurrence, so it is a question of what is a common occurrence. The fact of the matter is that he testified ropes break.

MARTIN LYDON, Witness for the carrier, testified:

Direct Examination by Mr. Braun.

My name is Martin Lydon. I live at 3010 West 55th Street, Chicago. My occupation has been that of a
245 grain trimmer since 1926.

In January, 1961, I worker as a grain trimmer and I knew John Banks. I remember the last time I work-
246 ed with John Banks. We worked at 98th Street, Norris Grain Elevator. That was the last day Johnny worked and it was in the month of January, 1961. My job was tripping.

That day, John Banks was at Calumet in the morn-
247 ing and they came over to 98th Street at noon time. John Banks was tripping in, the same thing I was doing. I worked probably 10 to 15 feet away from John Banks.

I did not see a rope fall out of the tower and hit John Banks and I do not remember his shovel being down for a half an hour that day. It is my best judgment that it was not down. John Banks did not complain to me at any time that day about feeling bad. He continued to work until the barge was empty. I did not see a rope break from the tower at any time that day.

Cross Examination by Mr. Liebenson.

The Witness: I do not remember the number of the barge. I worked on the side of the barge near the dock. When I work as a tripper, it is my job to look down into the barge and it is not my job to look at or worry about the shovels of other trippers.

At Norris they had hemp ropes and they do break every once in a while. I do not remember any rope breaking. When working, you've got to watch your own shovel. You can't watch the other man's. You can only look at one shovel.

Redirect Examination by Mr. Braun.

If any of the shovels stopped for a half an hour, I would not know it. Oh, yes, sure I would.

Recross Examination by Mr. Liebenson.

Oh, yes, I would remember if a shovel stopped for a half an hour. I didn't see no shovel stop.

The first time I was contacted about this was this year, 1963. That's when I got this (indicating). I think you sent this out (referring to claimant's counsel) but I didn't get it because I wasn't home that day. I do not remember whether any rope broke on the 27th or the 29th. I do not remember of any rope broken on the 26th, on the 24th or the 19th. Yes, I remember January 30, 1961. I didn't see no rope breaking. I do not remember what day of the week it was. I don't remember what the temperature was. I did see a rope break in 1944 and I remember it. I do not remember these other days. I don't remember whether it snowed that day. I was only in the warming house at noon on that day.

At noon time we were in there and before we went to work. You see, the man shoveling in the hole, there are two on each shovel and they can't go in but the is tripping, he can if he wants. He got to be there all the time. Nobody to relieve him.

255 I remember the last time I worked with John Banks without reference to what day of the month it was. I remember it good because the two of us walked up from the barge to the office. It was at Norris, 98th Street and John Banks went that way and I come this way because I live this way. I don't know what happened after that. I never saw him 256 after that. I didn't see no rope breaking. I am telling you the truth. I am telling you what I seen and that's all I can do. I would have known if a rope had broken there that day. I am quite sur of that.

Witness excused.

Mr. Braun: I have one request Mr. Enos. This morning during the questioning of Dr. Spiegel I asked him a question regarding his comment in the Federal Court and then Mr. Liebenson read something to him from Page 86 of the Federal Court transcript. To make sure that the record is correct 257 in that regard, I would ask whether we can agree at this time as to what actually appears on that page. May that be read?

Deputy Commissioner Enos: Go ahead.

Mr. Braun: Question by Mr. Griffin, and this is about the last third of the page:

"Question: Doctor, an acute subdural hematoma takes approximately how long to develop?

"Answer: Well, it is a proper question except that everything varies in degree.

"Question: Let me ask it this way: If death is due to an acute subdural hematoma, about how long goes (sic) does it take death to come after the hematoma?

"Answer: In General?

"Question: Yes. This is an acute one.

258 "Answer: Oh, I would say about—this is only on the basis of my past experience rather than any specific case—about five days."

262 Hearing in the above matter was closed by Deputy Commissioner.

263 Certification of transcript by Charles Hines, Court Reporter.

Exhibits introduced during the hearing include carrier's Exhibit A, a petition filed by attorneys for Chicago Grain Trimmers Association and New Amsterdam Casualty Company setting forth the suit filed by Agnes Banks against Norris Grain Company in the United States District Court for the Northern District of Illinois seeking damages of $100,000; 2) That the suit alleged a negligent act by Norris Grain Company and it resulted in a verdict of $30,000 on May 3, 1963 and that a motion was subsequently filed by Norris Grain Company for a directed verdict and new trial; 3) On May 9, 1963, a new trial was ordered unless a settlement of $19,000 was accepted; 4) The $19,000 payment was agreed to with out the consent of the employer or its insurance carrier; 5) That on February 21, 1964, the court ordered the Ad damnum be limited to $30,000 but this was opposed by Agnes Banks and her attorney; 6)That the court's offer of a new trial made available to Agnes Banks the opportunity to seek an

unlimited Ad damnum and that the acceptance of the $19,000 constituted actual prejudice to the employer; 7) That in addition to the actual prejudice, Chicago Grain Trimmers Association was presumed to be prejudice.

The prayer of the motion was that the claim before the Deputy Commissioner be dismissed. Exhibits attached to that petition included a certified copy of the action brought by Agnes Banks as Administratrix against the Norris Grain Company and certified copies of the orders of the Federal District Court in that action.

The May 9, 1963 order provided "arguments heard on motion of respondents for directed verdict made at close of libelant's case denied. Motion of respondents to set aside verdict and judgment entered thereon and to have judgment entered in accordance with respondents motion for directed verdict denied. The motion of the respondents for new trial will stand granted unless the libelant, within 10 days from this date, enters in the record a remittitur in the sum of $11,000."

Order dated May 16, 1963 reads: "Libelant accepts $11,000 remittitur. Enter judgment for libelant for $19,000 and costs."

Claimant's Exhibit 1—Answer to employer's petition to bar claim.

1) The answer admitted employer's allegations of Paragraph 1.
2) Admitted Allegations of Paragraph 2.
3) Alleged that the court entered a remittitur of $11,000.

4) Claimant agrees that she accepted the remittitur of $11,000 as ordered by the court.
5) Admitted allegations of Paragraph 5 of employer's motion.
6) Denied that new trial would give claimant unlimited Ad damnum and further alleged that if claimant did not accept remittitur of $11,000, she would be prejudice.
7) Denied employer was prejudice on May 16th order.

Claimant's Exhibit 2—Death certificate of John Banks.

Claimant's Exhibit 3—Autopsy Protocol setting forth nine findings on Coroner's examination.

Claimant's Exhibits 4, 5, 6, 7 & 8—Photographs of Norris Grain Company elevators.

Claimant's Exhibit 9—Court reporter's statement of Michael Miramontez.

TRANSCRIPT OF PROCEEDINGS
CASE NO. 46-71

U. S. Department of Labor,
Bureau of Employee's Compensation

(Testimony started May 18, 1961)

2 The Commissioner recited that the claim was filed by Agnes M. Banks on February 20, 1961 and that administrative reports revealed that on January 26, 1961, John J. Banks was employed by Chicago Grain Trimmers Association, Inc.

3 It is alleged that on January 26, 1961, the decedent was injured while engaged in his employment; that injury occurred on the afternoon of said day and that

on the afternoon or evening of January 30, 1961, the decedent fell down the basement stairs while at home and sustained injuries which were the immediate cause of death on February 12, 1961.

The Commissioner recited that the sole issue was whether the fall which caused the death was a consequence of an injury which arose out of and in the course of employment.

AGNES M. BANKS testified in behalf of the Claimant as follows:

Direct Examination by Mr. Moses.

My name is Agnes Banks. I live at 3520 East 112th Street, Chicago 17, Illinois. I was the wife of John Banks.

On Thursday, the 26th, I talked to my husband when he came home from work. I was sick at the time but I got out of bed and we had coffee. He hollered to me and said, "Well, your brother isn't the only casualty on the river" and he said, "I got hit with a cable today". He asked me to look at his head and I said I couldn't see anything but he said, "it feels light". I looked at his head again and he said, "it felt light". That's all he said. I didn't see anything unusual at that time.

He also asked my cousin, Lucille Hoff to look at his head and he said to her that he didn't feel good. Several times in the evening, he mentioned that he was hit with the cable at work. He made complaints that he had a light feeling up there and he asked for an aspirin because he said his head hurt when he laid across the bed. When he said up there, he indicated to the left side of his head.

He didn't complain to me on Friday and on Saturday morning he didn't say anything but he was more quiet. On Sunday when he was getting dressed for church, he didn't feel good. He asked me to look at his back but I didn't see anything. On Sunday he didn't make his usual comments, he didn't work puzzles. He just sat it out, and when supper came, he ate little. He did not complain.

On Monday morning, he said, "Don't make lunch for me, I'm not hungry" and I didn't. I didn't think that was funny until all this took place.

It was unusual for me not to pack a lunch for him. I packed one every day.

He came home Monday about 4:00. He picked up my daughter's baby and brought her in the basement. He took the baby back up stairs and he came to the top of the stairs in what could have been five minutes and said "Ag, I want to ask you something'.

He never said no more. He came right through the air like a shot, his head hit the pavement, the cement in the basement and he just went to his back.

My husband was an employee of the Chicago Grain Trimmers Association. He was a charter member and a stock holder in that organization. The President of the Grain Trimmers Association is Lawrence Banks who is a brother of John Banks. When I called Mr. Greenon in the morning, I told him about Thursday, January 26, that I remembered about John being hit on the head.

Cross Examination by Mr. Braun.

After I saw him fall, I couldn't say that I noticed any odor of alcohol and I couldn't say that I didn't.

42 In the days from January 26 to January 30, I no-
43 ticed unusual things about my husband as far as holding a real good conversation, there was none and if you ask him a question, you never got an answer. I didn't see anything unusual about his skin.

54 *Questioning by Deputy Commissioner Enos.*

On Monday, the 30th, I was in the basement. I only ironed a pair of pants. I wasn't washing clothes.
58 He stood at the top of the stairs and called to me and the next thing, he came flying down the stairs. He came head first. He never touched. You could have crawled under him. That's how high he stayed. He did not cry out.
60 From January 26th to January 30th, he would be normal but he was overly quiet. It could be that he was like he was depressed. He had a rugged skin. It would be hard to notice any change in his coloring. I didn't notice any palor.
62 Unusually on Sunday when he came home from church, he worked his puzzle. That day, he didn't. He usually worked five puzzles but that day he never worked one. He didn't complain. He spent a very quiet day.

155 DR. JOSHUA I. SPEIGEL, witness for claimant, Testified:

Direct Examination by Mr. Moses.

My name is Joshua I. Speigel. I reside at 6801 South Bennett Street. I am a licensed physician in
157 the State of Illinois. I had occasion to see John Banks in the South Chicago Hospital. I was called

158 in by Dr. Koehler. At the time I saw him I considered the possibility of a subdural hematoma and I saw him daily and then I had to leave the City with a sick patient.

161 From my own notes which are from the 3rd of February, I found the right upper extremity is paralyzed. He is confused and partially aphasic. There is a history of cranial injuries 3 days prior to the "cerebral vascular accident". I disagreed with them.

162 I was advised by the treating doctor, Dr. Koehler, of the previous injury 3 days prior to admission. The history was that 3 days prior to his having fallen down the steps, that he had injured himself, he had been struck on the side of the head by something heavy.

163 Following that, he complained of difficulty, cranial cerebral difficulty, headaches and other things. Based
164 on my examination, I came to the conclusion that the initial injury, that injury which occurred 3 days prior to the 30th of January, was the basic cause for his falling down the steps and sustaining the second injury.

165 Subdural hematoma such as this man had is a slow process. Contrary actually to what everybody else thinks, it is not caused by direct bleeding. There is only a small amount of bleeding. This bleeding doesn't generally kill or even give evidence of its presence.

Now, the clot breaks down in the center and forms a fluid of very high specific gravity. It is surrounded by a membrane which is the remainder of the clot. Right next to it is a great lake of fluid, cerebrospinal fluid. This is a perfect mechanism for osmosis. I am sure that everyone is acquainted with that.

There is no more bleeding. The liquid of very slow specific gravity, cerebrospinal fluid, almost like water, by osmosis, begins to fill up this sac. Over a period of time running from a few days to as long as three months, this begins to fill. There is a physical phenomenon that makes one fill more quickly than the other. This is called the latent interval. There even a mild injury, a very mild injury, such as bumping the head, can result in such a small clot which gradually grows by osmosis until it paralyzes the patient and kills him.

Therefore, it is my feeling that he had a cranial cerebral injury three days prior to the fall; that the subdural hematoma was developing at this time;
166 that he fell and as a result of it sustained further injury, but that the subdural hematoma was secondary to the initial injury.

Is that clear?

168 Hypothetical question by Mr. Moses:

Now, Doctor, assume that a man forty-nine years old, who is in good health and steadily employed, while in the course of his employment was struck on the left side of his head by a steel cable;

Assume further that the same evening a small dot about the size of a pencil dot appeared on his left eyebrow, over his left eyebrow and that he complained of headache;

That he was quieter than usual in his actions on the following three days, but he ate less than normal; that he went about his usual occupation on the following day after he was so struck on the head, the following day being Friday, a workday, and also that

he went about his usual occupation on the following Monday thereafter without complaint;

That on the afternoon of the third day, following
169 the said accident, while standing at the top of a flight of stairs leading to a basement, and while in the middle of a conversation, he suddenly stiffened up and fell down the said stairs, landing on the right side of his face and head; that the basement floor was concrete; that he was taken to the hospital immediately thereafter while still unconscious; that he was bleeding from a laceration at the right parietal region; that he responded only to painful stimuli when struck or stuck with a safety pin; that his blood pressure was 102/70, pulse 82 regular, and full, that his pupils were equal, round and medium wide; that his Achilles tendon reflexes and patellar reflexes were present; that a Babinski test was negative; that his right upper extremity appeared paretic; that all of his other extremities reacted to strong, painful stimuli; that there was no bleeding from his ears or nose; that he had a laceration at the right parietal region about one inch long, which was sutured; that on that same night that he was admitted to the hospital a spinal puncture was made and the spinal fluid was very bloody, and had a pressure of 300;

That on the second day in the hospital his condition worsened and he was more comatose; his reflexes were gone, his pupils were very narrow, and he had Shane's strokes breathing;

170 That on the third day in the hospital he remained in a deep coma and that on the fourth day in the hospital his right upper extremity was paralyzed and he was confused and partially aphasic; that on

the fifth day in the hospital his condition improved and the patient sat up and he came out of his deep coma but remained in a mild stupor; he was able to mumble words; his right upper extremity was paretic and his left lower extremity was paretic;

That on the ninth day in the hospital he was still irrational most of the time, but complained about distress in his upper abdomen;

That on the twelfth day in the hospital he got worse and was in a stupor; that he could not talk or understand orders; that a Babinski test was strongly positive at the left side; that on the 13th day that he was in the hospital, he died;

That an inquest was performed the same day that he died and the Coroner's physician found the following autopsy protocol:

"(1) Obliteration of right nasolabial fold.

"(2) Incised wound one-eight inch long over the right parietal region.

"(3) Area of depression of scalp about three-eighths of an inch in diameter over right parietal region.

171 "(4) Large hematoma below the scalp about one and one-half inches in diameter in right parietal region extending to the calvarium.

"(5) Small puncture wound over left parietal region—healed injury.

"(6) Massive subdural hemorrhage extending over entire left cerebral hemisphere.

"(7) Basal skull fracture extending from right parietal region to the cribiform plate of ethmoid bones.

"(8) Fracture through the posterior plate of the hypophysis.

"(9) Blood was found in ventricles of brain."

172 It is my opinion that there might or could be a causal connection between the hypothetical patient's injury by a steel cable and his death.

173 *Cross Examination by Mr. Braun.*

175 The massive subdural hemorrhage extending over the left cerebral hemisphere is also consistent with a severe trauma to the right side of the head. It is quite common that a severe trauma to the right side
176 of the head will cause a subdural hematoma to be formed on the left side.

178 Blood in the ventricles is consistent with serious brain damage, that is, lesions in the brain itself and consistent with severe trauma to the right side of the head.

179 All of the major findings on autopsy are consistent with a severe trauma to the right side of the head.

A subdural hematoma would not be diagnosed on the basis of the single complaint of headache.

180 It is correct to say when a subdural hematoma forms it can be very slow in forming and there may be no complaint whatsoever on the part of the patient initially. After it becomes larger, it manifests itself in clearing demonstrable signs. Once there are clearly observable clinical signs a subdural hematoma continues to progress. It cannot be stopped except by surgery. It is an operable condition and the patient can be cured.

181 As the subdural hematoma progresses, the pain of headache which is frequently present increases.

There is frequently headache and the patient becomes mentally obtundent, stuporous. Actually, that is one of the first observable signs except that one of the sides becomes partially paralyzed.

The paralysis does not invariably come on gradually. It can come on suddenly and the patient would
182 then have pain and he may pass out.

It is not the common thing that he would pass out suddenly. The slow bleeding of the subdural hematoma normally takes about two weeks before it is noticed but I have seen them at 3 months.

I have also seen them in a short time but that is an acute subdural hematoma which kills in a matter of hours. The acute subdural is a different phenomenon. It develops very suddenly, you have extensive bleeding in the subdural spaces and it kills. It is the type you would see occur in a couple of hours.

183 When a subdural hematoma is formed and is reaching a stage where it would cause some clinical signs, this would affect a man's reflexes and coordination.

185 I know that the grossly bloody fluid in the spine found when this man was taken to the hospital did not come from a subdural hematoma and the formation of a subdural hematoma does not make the spinal fluid bloody.

186 When we do a spinal puncture and find the fluid is grossly bloody, we know that there is a lesion in the brain itself and not the subdural space. The lesion is contiguous to the subarachnoid space or in the ventricles.

195 My associate saw this man at approximately 10:30 PM and he indicated that he did observe an odor of
196 alcohol. It was my associates impression when he

first saw the patient that his fall was associated with alcohol.

197 My associate diagnosed the condition as alcoholism with cerebral vascular accident, not surgical. I thought it was possibly surgical. The fact that I didn't write that in the record is of little significance.

198 A subdural hematoma is normally surgical, that is, it can be cured, most of them can be cured.

199 A laceration of the brain will normally cause bleeding into the spinal canal which would be evidenced by red blood when the spinal puncture is done. That condition is not surgical.

If this man had not had blood in the spinal fluid, I would have operated. A subdural hematoma could have been evacuated by surgery.

275 DR. ERIC OLDBERG called on behalf of respondent, Testified:

Direct Examination by Mr. Braun.

276 Qualifications of Dr. Oldberg.

277 Hypothetical question was propounded to Dr. Oldberg including a description of a 49 year old white male employed as a grain trimmer on January 26,
278 1961. Further, a description of the work; that a steel cable had broken on that day and a small red spot had been noted over the hypothetical man's left eyebrow but he continued to work; that a co-worker drove him from the elevator site to the company's office, nothing was said about anything unusual happening, he finished his normal work but a linear scratch was seen above the left eye and a co-worker
279 saw a black spot about the left eye. He got home

that evening, complained of a headache and took an aspirin. His brother looked at his forehead the next morning at work and saw a small black dot but the man said he felt alright. While working on that following day, his co-workers noted nothing unusual
280 about him and he made no complaint. On Saturday and Sunday he was at home, he spent a quiet day and did not work his puzzles as he usually did. On
281 Monday morning he went to work, he told his brother he felt alright and his co-workers noticed nothing unusual about him. On Monday he worked as a tripper at the Norris Elevator which required manual dexterity and coordination and his co-workers observed that he did the work in a normal fashion without complaint. The doctor further considered that he completed work for the day and went to a tavern
281 with a co-worker. He had at two or three beers and arrived home at approximately 4:10 PM during which time he made no complaint of ill-being. Thereafter, his wife observed him suddenly stiffen, fly through the air and strike his head on the concrete floor in the basement. The findings in the hospital record
282 were included in the hypothetical question as were
285 the findings on autopsy. The doctor gave his opinion that there was no connection between the man's work and the subsequent trauma at home. One of the
286 reasons for the opinion was all of the findings upon autopsy were findings created by blows of a relatively massive character, all consistent with the blow sustained by the head striking the concrete. Also, his
288 subsequent course for two weeks in the hospital is what one would expect in a person who had received a blow, such as striking the head on the basement

floor and, in other words, it would be far beyond the realm of medical certainty for the incident at work to be an inciting or etiological part in the subsequent developments. A four or five day interval
289 is a very, very short time for a subdural hematoma of any size to develop. When it does develop, it doesn't suddenly produce unconsciousness as appears to have been the case here. It acts a good deal like a brain tumor. It progresses slowly, enlarges, causes pressure and the patient slowly becomes stuperous. They begin devoloping neurological signs. They don't go along normally and then several days after the inciting cause lose consciousness. It doesn't occur.
290 People don't get subdural hematomas and go on normally for four or five days and then suddenly lose consciousness.

292 *Cross Examination by Mr. Moses.*

293 I can hardly conceive of a half inch cable inflicting a blow that would cause a subdural hematoma. If it were a blow of that force, it would have to leave some external evidence.

64 PATRICK KENNEDY called on behalf of claimant, testified:

I cannot say whether a cable hit or not. He did not make any complaint to me. He made no complaint
78 to me, all he said was would you look it up. I didn't hear John cry out. The only thing I saw was a tiny
85 speck above his eyebrow and when I worked with him on Monday, the 30th, I did not notice anything unusual about him and this was true during the three days, the 26th, 27th and the 30th.

95 JAMES GREENAN called on behalf of claimant, testified:

96 A cable broke on January 26th. I did not see John Banks get hit I didn't hear anybody say anything
99 about getting hit. John Banks made no complaint on that day or the next day, the 27th or on the following Monday, the 30th. He did his work in a normal manner on Monday morning, the 30th. On the late afternoon of that day, he made no complaints whatsoever.

101 THOMAS J. CURRAN called on behalf of claimant, testified:

105 On the 26th, I didn't notice anything unusual about John Banks. He made no complaint to me when I worked with him on the 30th at Calumet and didn't
106 notice anything unusual. He did his normal work.

115 LAWRENCE BANKS called on behalf of claimant, testified:

I am a brother of John Banks. I am president of
116 the Chicago Grain Trimmers Association. On January 26th, I saw him at Calumet Elevator and then at Gateway and I drove him home. My brother did not drive a car. He told me they didn't finish the
117 barge because there was a broken cable and they had to put on a new one so it delayed the job. He
118 said in fact, it got me. He mentioned his left tem-
119 ple. I didn't look at it at that time. I saw him the next morning at Gateway Elevator. He pointed to his left temple and I could see a little black speck, a very tiny particle and he said, that's a piece of that cable that got me. I saw him on Monday morning at 8:00 o'clock and he said that he was alright.

133 GEORGE GRABOWSKI called on behalf of claimant, testified:

134 On the afternoon of January 26, I saw John Banks in the office of the Grain Trimmers. He said he got hit with a cable at the Gateway Elevator. I did not
135 look at it. I did see a mark on his forehead, on the left hand side of the eye like a scratch. I believe it was red.

138 EDWARD J. WAGNER called on behalf of claimant, testified:

I saw John Banks on the morning of January 30.
139 John says, look, I got hit with a cable and I saw a little black speck on his forehead. That happened on
140 the Thursday before at Gateway. During all the time
141 that I worked with him on the 30th, he didn't complain.

146 FRANK COSTELLO called on behalf of claimant, testified:

I am a brother of Mrs. Agnes Banks. I had a conversation with John Banks in the afternoon of January 26th and he told me that he got hit by a cable. He did not show me any marks or bruises. The next
147 time I saw him was in the hospital.

245 JAMES H. WHALEN called on behalf of employer, testified:

I worked with John Banks on the 30th of January,
246 1961 at Norris Elevator and he made no complaint of feeling ill in any way. After work we went to a
247 tavern at 103rd and Avenue M. We could have had at least three beers and then I took John home. I

stayed at his home about 20 or 30 minutes at the
248 most. During this time he made no complaint of feeling ill.

252 JAMES HAWKINS called on behalf of employer, testified:

During the time I worked with John Banks on January 26th, I drove him from the elevator to the
253 office and he made no complaint of feeling ill and he said nothing about being injured. He didn't say anything to me about being injured when I saw him on the 27th and he did his work normally as far as I knew on the 30th when we worked at the Calumet Elevator.

255 EDWARD KOSIARA called on behalf of employer, testified:

I worked with John Banks on Monday, January 30th at Norris Elevator, 98th and the river. During
258 the afternoon on January 30th, he did not complain of feeling ill in any way and I did not notice anything unusual about him and he never told me about getting hurt.

261 Charles McKenna testified to action of cable in drawing, scoop to base of marine leg. He did work at Gateway Elevator on January 26, 1961, a Thursday.

26 DEFENDANT DEPUTY COMMISSIONER'S MOTION FOR SUMMARY JUDGMENT.

Now comes the defendant Deputy Commissioner, by Edward V. Hanrahan, United States Attorney for the Northern District of Illinois, and moves the Court to sus-

tain his compensation order herein appealed by plaintiffs, Chicago Grain Trimmers Association, Inc., and New Amsterdam Casualty Co., and to enter judgment for the defendant deputy commissioner, dismissing the complaint, on the ground that there is no genuine issue as to any material fact and that the defendant deputy commissioner is entitled to judgment on the record as a matter of law.

This motion is addressed to the assignments and specifications of error alleged to have been committed by defendant deputy commissioner and is based upon the certified copy of the transcript of proceedings held before the defendant as deputy commissioner, Bureau of Employees' Compensation, United States Department of Labor, on August 29, 1963 and October 1, 1963, in the matter of John J. Banks by Mrs. Agnes M. Banks, et al., Case No. 46-73 (Fatal), herein filed, together with exhibits therein.

/s/ Edward V. Hanrahan
United States Attorney

27 PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

Now comes the plaintiffs, Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Co., by Klohr, Braun & Lynch, their attorneys and moves the court to enter judgment for the plaintiffs reversing and setting aside the award of the Deputy Commissioner as prayed in the Complaint and permanently enjoin the enforcement of said award on the ground that the award is barred by prior compromise, is without substantial foundation in the evidence and the action is barred by a prior determination of the claim.

In support of this motion plaintiffs submit an abstract of the proceedings before the Commissioner and their brief

and argument thereon and in addition submit to the court certified copies of motions filed by the defendant, Norris Grain Company, in case No. 61 C 1515, copy of which are attached hereto as Exhibts 1, 2 and 3 and in further
28 support of said motion plaintiffs submit copies of plaintiffs' answer to the claim filed before the Deputy Commissioner and plaintiffs' notice to the Deputy Commissioner that the claim would be controverted as plaintiffs' Exhibits 4 and 5, the originals of which are in the position of the Deputy Commissioner but were not certified to the court by the Commissioner.

/s/ Mark A. Braun
Klohr, Braun & Lynch,
Attorneys for plaintiffs

29 PLAINTIFF'S EXHIBIT NO. 1.

In The United States District Court
For The Northern District Of Illinois
Eastern Division

Agnes Banks, Administrator of the Estate of John J. Banks, Deceased, Libelant,
vs.
Norris Grain Company, a corporation, Respondent.
No. 61 C 1515

MOTION.
(Filed May 1, 1963)

Now, at the close of all of the evidence introduced in behalf of the libelant herein, the libelant having rested, comes the respondent, Norris Grain Company, by Joseph W. Griffin and Karl M. Tippet, its attorneys, and moves the Court to instruct the Jury to find the respondent,

Norris Grain Company, not guilty and for reasons therefor shows unto the Court the following:

1. That there is no evidence of negligence on the part of the respondent.

2. That decedent's death was not caused by any negligence on the part of the respondent.

The respondent presents herewith and asks the Court to give to the Jury the following written instruction:

The Court instructs the Jury to find the respondent, Norris Grain Company, a corporation, not guilty.

/s/ Joseph W. Griffin
/s/ Karl M. Tippet
Attorneys for Respondent.

31 PLAINTIFF'S EXHIBIT NO. 2.

In The United States District Court
For The Northern District Of Illinois
Eastern Division

Agnes Banks, Administrator of the Estate of John J. Banks, Deceased, Libelant,
vs.
Norris Grain Company, a corporation, Respondent.
No. 61 C 1515

MOTION.
(Filed May 2, 1963)

Now, at the close of all of the evidence introduced in behalf of libelant and the respondent, comes the respondent, Norris Grain Company, by Joseph W. Griffin and Karl M. Tippet, its attorneys, and moves the Court to instruct the Jury to find the respondent, Norris Grain

Company, not guilty and for reasons therefor shows unto the Court the following:

1. That there is no evidence of negligence on the part of the respondent.

2. That decedent's death was not caused by any negligence on the part of the respondent.

The respondent presents herewith and asks the Court to give to the Jury the following written instruction:

The Court instructs the Jury to find the respondent, Norris Grain Company, a corporation, not guilty.

/s/ Joseph W. Griffin
/s/ Karl M. Tippet
Attorneys for Respondent.

33 PLAINTIFF'S EXHIBIT No. 3.

In The United States District Court
For The Northern District Of Illinois
Eastern Division

Agnes Banks, Administrator of the Estate of John J. Banks, Deceased, Libelant,
vs.
Norris Grain Company, a corporation, Respondent.
} No. 61 C 1515

MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT OR FOR NEW TRIAL.
(Filed May 9, 1963)

Norris Grain Company, a corporation, respondent, by Joseph W. Griffin and Karl M. Tippet, its attorneys, moves the Court to set aside the verdict of the Jury and the judgment entered thereon, and to have judgment entered

in accordance with the respondent's motion for directed verdict for the following reasons:

1. That there was no evidence of negligence on the part of the respondent.

2. That decedent's death was not caused by any negligence on the part of the respondent.

3. That decedent's death was caused by his own negligence. Or, in the alternative, respondent moves the Court to set aside the verdict and the judgment entered theron and grant respondent a new trial for the following reasons:

A. The verdict is contrary to the law.

B. The verdict is contrary to the evidence.

C. The verdict is contrary to the law and the evidence.

D. The judgment is contrary to the law.

E. The judgment is contrary to the evidence.

34 F. The judgment is contrary to the law and the evidence.

G. Prejudicial error was committed by:

1. Refusing to admit into evidence admissions against interest made by decedent that on January 26, 1961, he was injured when struck in the head by a steel cable.

2. Restricting the cross examination of Dr. Joshua Spiegel, witness for libelant, so that evidence could not be put before the Jury concerning the hypothetical facts on which the doctor had previously given an opinion that the fall of the deceased and his death on January 30, 1961, was due to an injury received on January 26, 1961, which was contradictory to the opinion this witness gave in the trial of this suit that an injury received on January 30, 1961, was the cause of the decedent's fall and his death on that date, and in refusing to permit cross examination of this witness as to the reasons for his previously expressed contradictory opinion.

3. Restricting the cross examination and adverse examination of Agnes Banks, Administrator, concerning the alleged head injury received by the decedent on January 26, 1961, and her testimony at the hearing conducted by the Commissioner, hearing the Longshoremen's and Harbor Worker's Claim filed, based on an injury to the decedent's head received January 26, 1961.

4. Permitting libelant, over objection of respondent, to read into evidence the extremes of temperature and snowfall for the days, January 20 to 30th, inclusive, 1961, which were read from the United States Weather Report that concerned the entire Chicagoland area, without any reference in the report to such temperature and snowfall in the particular area where the alleged accident of January 30, 1961, occurred.

5. Refusing to permit respondent to introduce into evidence any testimony concerning the decedent's alleged accident of January 26, 1961, involving an alleged head injury, unless respondent would conclusively establish by such evidence that decedent received an actual injury to his head on January 26, 1961, despite decedent's admissions to Agnes Banks and others that he had received such an injury on January 26, 1961.

6. Refusing to grant respondent's motion to withdraw a juror submitted after prejudicial comments to the Jury made by the Court in explaining the Court's understanding of the theories involved in the suit, and in explaining the Court's reason for ruling as it did on respondent's objection to the admission into evidence of two monthly weather reports.

7. Permitting libelant's attorney, over objection of respondent, to argue to the Jury that Agnes Banks did not get anything out of the claim made under the Longshoremen's and Harbor Workers Act for the decedent's

alleged head injury allegedly received on January 26, 1961.

8. In instructing the Jury, over the objection of the respondent, that the doctrine of res ipsa loquitur applied, by giving the following instruction:

36 "The plaintiff has the burden of proving each of the following propositions:

"First: That the decedent just before and at the time of the occurrence was using ordinary care for his own safety.

"Second: That the decedent was injured in his person.

"Third: That the injury was received from a manila rope on a marine leg which had been under the defendant's management.

"Fourth: That in the normal course of events, the injury would not have occurred if the defendant had used ordinary care while the manila rope on marine leg was under its management.

"If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to the manila rope on marine leg while it was under its control or management. If you do draw such an inference your verdict must be for the plaintiff if any injury or damage proximately resulted. But if, on the other hand, you find that any of these propositions has not been proved, or if you find that the defendant used ordinary care for the safety of others in its management of the manila rope on marine leg, then your verdict should be for the defendant."

9. In refusing to give for the respondent the following instruction:

"The libelant has the burden of proving each of the following propositions:

"First, that the decedent, John Banks, before and at the time of the occurrence was using ordinary care for his own safety;

"Second, that the respondent acted, or failed to act in one of the ways claimed by the libelant as stated to you in these instructions and that in so acting, or failing to act, the respondent was negligent;

"Third, that the decedent, John Banks, was injured.

37 "Fourth, that the negligence of the respondent was a proximate cause of the death to the decedent, John Banks.

"If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the libelant, but, if, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the respondent."

/s/ Joseph W. Griffin
/s/ Karl M. Tippet
Attorneys for Respondent.

Received a copy of the above and foregoing Motion for Judgment in Accordance with Motion for Directed Verdict or For New Trial this 8th day of May A.D., 1963, at the hour of 3:15 P.M.

/s/ Director & Liebenson

39

PLAINTIFF'S EXHIBIT NO. 4.

Form US-215

U. S. DEPARTMENT OF LABOR—BUREAU OF EMPLOYEES' COMPENSATION

Office of Deputy Commissioner_____

Administering Longshoremen's and Harbor Workers' Compensation Act

LEAVE THIS SPACE BLANK

Case No._____

Insurance Carrier's No._____

ANSWER OF EMPLOYER OR INSURANCE CARRIER TO EMPLOYEE'S CLAIM FOR COMPENSATION

Agnes Banks, Widow of John J. Banks, Claimant

vs.

Chicago Grain Trimmers Association, Inc., Employer

New Amsterdam Casualty Company, Insurance Carrier

The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is [denied / admitted] that applicant sustained an injury on or about the date set forth in the application.

2. It is [admitted / denied] that both the employer and employee were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury.

3. It is [admitted / denied] that the relationship of employer and employee existed at the time of the injury.

4. It is [admitted / denied] that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is [admitted / denied] that notice of injury was given employer as specified in application.

6. It is [admitted / denied] that applicant was permanently disabled to the extent stated in application.

7. It is [admitted / denied] that applicant was temporarily disabled for the period stated in application.

8. It is [admitted / denied] that the rate of wages as set forth in application is correct.

9. That the entire issue of the death of John J. Banks, Deceased, was related in any way to his employment at the Chicago Grain Trimmers Association, Inc. has been determined by the Deputy Commissioner in a previous hearing.

Signed_____

Note.—The employer or insurance carrier should answer the claim within ten days from the date that a copy of it is served upon him. The original answer should be mailed to the deputy commissioner at the above address and a copy thereof served upon the claimant either personal or by mailing to the address in the claim.

Form CB-207

Form approved.
Budget Bureau No. 44-R062.

U.S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

OFFICE OF DEPUTY COMMISSIONER _____
Administering Longshoremen's and Harbor Workers' Compensation Act

LEAVE THIS SPACE BLANK

Case No. _____

Insurance Carrier's No. _____

NOTICE TO THE DEPUTY COMMISSIONER THAT CLAIM WILL BE CONTROVERTED

(To be submitted in duplicate to Deputy Commissioner, who will forward copy to employee)

NOTE.—This form must be completed and filed with the Deputy Commissioner on or before the 14th day after the employer has knowledge of the alleged injury or death, in all cases where the right of the injured to compensation is controverted.

1. Name of employer Chicago Grain Trimmers Association, Inc.

2. Office address: Street and No. Lake Calumet Dock, City or town Chicago State Ill.

3. Name of injured employee John J. Banks

4. Present address: Street and No. 3520 E. 112th St., City or town Chicago State Ill.

5. Date of alleged injury or first illness from disease Unknown, 19__, ____ M.

6. Nature of alleged injury or occupational disease Decedent sustained fatal injuries when he fell down stairway at his home.

7. When was notice of injury received from employer? The employer was advised of this non-occupational fall 2 days after employee's death, 19__

8. This case will be controverted for the following reasons (State specific reasons to be relied upon):

The claim of the dependents of John J. Banks for any benefits that might be due them under the Longshoremen's and Harbor Workers' Compensation Act was heard and adjudicated by Deputy Commissioner R. C. Enos under his decision of June 8, 1961. This finding is final and completely determines the issue of whether John Banks' death resulted from an accidental injury that arose out of his employment.

9. Do you believe that disposition of a claim in this case can be made without the necessity for formal hearing? Yes (Yes or no)
The employer moves for the immediate dismissal of this claim for the reason that the issues alleged have been determined by the Commission

Name of Insurance Carrier New Amsterdam Casualty Company

Signed by _____

Official title Attorney

Dated 21 September, 19 61

16-42220-4 U.S. GOVERNMENT PRINTING OFFICE

41

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter coming on to be determined before the Court, without jury, and upon cross-motions for summary judgment by the plaintiffs and the defendant, and the Court having considered the pleadings on file, briefs, and the transcript of proceedings before the defendant, Deputy Commissioner of Labor, and being fully advised in the premises makes the following:

FINDINGS OF FACT.

1. This action is an appeal by the Chicago Grain Trimmers Association, Inc., and its insurance carrier, New Amsterdam Casualty Company, seeking reversal of an award of compensation benefits made by the defendant, Depu-

42 ty Commissioner, R. C. Enos, to Agnes M. Banks.

2. This Court adopts as its findings of fact the statements of facts contained in the compensation order of the defendant, Deputy Commissioner, as more fully set forth in the entire record of proceedings before the Deputy Commissioner;

Wherefore, upon the foregoing facts this Court makes the following:

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the parties and the subject matter, pursuant to the Longshoremen's and Harbor Workers Compensation Act, as amended, 44 Stat. 1424, as amended.

2. There is no genuine issue of a material fact presented herein, and this action may properly be determined upon the cross-motions for summary judgment filed by the plaintiffs and the defendant.

3. There is substantial evidence in the transcript of administrative proceedings which supports the findings of

fact of the defendant, Deputy Commissioner, and the award based thereupon; and the decision and award of the defendant, Deputy Commissioner, was in accordance with law
43 and is therefore final and conclusive; this Court must therefore grant the defendant's motion for summary judgment and deny the plaintiff's motion for summary judgment, affirm the decision and award of the defendant, Deputy Commissioner of Labor, and dismiss the Complaint.

Enter: /s/ James B. Parsons
Judge

Dated: June 2, 1965.

44 ORDER ENTERED JUNE 2, 1965.

It is ordered and adjudged that, the defendant's motion for summary judgment is allowed; the plaintiff's motion for summary judgment is denied; the compensation order of the Deputy Commissioner is affirmed, and the action dismissed on the merits.

Enter: /s/ James B. Parsons

46 NOTICE OF APPEAL.
(Filed July 26, 1965)

Notice is hereby given that Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Company, corporations, plaintiffs in the above named cause, hereby appeal to The United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on the 2nd day of June, 1965.

Chicago Grain Trimmers Association, Inc., and New Amsterdam Casualty Company, appellants
By: /s/ Klohr, Braun & Lynch,
Attorneys for Appellants

47 CERTIFICATE OF MAILING.

I, Elbert A. Wagner, Jr., Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on July 26, 1965, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to:

Honorable Edward V. Hanrahan, U. S. Attorney
15th Floor U. S. Court House
Chicago, Illinois 60604
Attention: John Peter Lulinski, Chief Appellate Division
Frederick E. McLendon, Jr., Assistant U. S. Atty.

Harold A. Liebenson,
77 West Washington Street
Chicago, Illinois 60602

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 27th day of July, 1965
Elbert A. Wagner, Jr., Clerk
By: /s/ Gizella Butcher
Deputy Clerk

48 STIPULATION OF CONTENTS OF RECORD ON APPEAL.

Pursuant to Rule 12(e) the parties hereby designate the following for inclusion in the record on appeal to the United States Court of Appeals for the Seventh Circuit, taken by notice of appeal filed on July 26, 1965:

1. Statement required by Rule 12(c) of the United States Court of Appeals for the Seventh Circuit.
2. Plaintiff's Complaint filed February 20, 1964.

3. Answer of Defendant filed June 11, 1964.

4. Official report of proceedings had before Deputy Commissioner of the Tenth Compensation District of the United States Department of Labor, Case No. 46-71, Pages 1-304 and official report of proceedings, Case No. 46-73, Pages 1-263.

5. Defendant's Motion for Summary Judgment filed December 28, 1964.

49 6. Plaintiff's Motion for Summary Judgment filed March 22, 1965, including Exhibits 1, 2, 3, 4 and 5, filed in support of Plaintiffs' Motion for Summary Judgment.

7. Order allowing defendant's Motion for Summary Judgment and denying plaintiffs' Motion for Summary Judgment and Findings of Fact and Conclusions of Law entered June 2, 1965.

8. Notice of Appeal filed July 26, 1965.

9. Appeal Bond filed July 26, 1965.

10. Certified copy of docket entries.

Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Co.,
Plaintiffs-Appellants
By: /s/ Klohr, Braun & Lynch,
their attorneys

R. C. Enos, Deputy Commissioner,
Defendant-Appellee
By: /s/ Edward V. Hanrahan,
U. S. Attorney

CERTIFICATE OF CLERK.

I, Elbert A. Wagner, Jr., Clerk of the United States District Court for the Northern District of Illinois, do hereby certify to the United States Court of Appeals, for

the Seventh Circuit, that the documents submitted herewith and annexed hereto are the original papers filed and entered of record in my office on the dates designated in the table of contents, and together with a true copy of the docket entries as they appear in the official docket in this office and the Official Report of Proceedings before R. C. Enos, Deputy Commissioner of the Tenth Compensation District of the U. S. Department of Labor, in four (4) volumes, transmitted herewith under separate certificates for the sake of convenience, constitute the record on appeal, in the cause entitled: Chicago Grain Trimmers Association, Inc., and New Amsterdam Casualty Company, Plaintiffs vs. R. C. Enos, Deputy Commissioner, Defendant, No. 64 C 306.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 2nd day of September, 1965.

Elbert A. Wagner, Jr., Clerk
By: /s/ McClendon Grice,
Deputy Clerk

Respectfully submitted,

KLOHR, BRAUN & LYNCH,
39 S. LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Plaintiffs-Appellants.

MARK A. BRAUN,
Of Counsel.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60610

Wednesday, July 13, 1966

Before

Hon. F. RYAN DUFFY, *Circuit Judge*

Hon. WIN G. KNOCH, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., and NEW AMSTERDAM CASUALTY COMPANY,
Plaintiffs-Appellants,
vs.
R. C. ENOS, Deputy Commissioner,
Defendant-Appellee.

No. 15342

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, in accordance with the opinion of this Court filed this day.

In the
United States Court of Appeals
For the Seventh Circuit

No. 15342 SEPTEMBER TERM, 1965 APRIL SESSION, 1966

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., and NEW AMSTERDAM CASUALTY COMPANY,
Plaintiffs-Appellants,
v.
R. C. ENOS,
Deputy Commissioner,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 13, 1966

Before DUFFY, KNOCH, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* A determinative question presented in this appeal is whether the doctrine of res judicata should be applied to a claim for compensation death benefits filed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, because of an administrative denial of a prior claim filed by the same dependents seeking similar relief.

This action was instituted under section 921 of the act to set aside an order of the deputy commissioner, Department of Labor, dated January 27, 1964, granting compensation death benefits to the widow and minor children of John J. Banks, deceased. The plaintiffs are the Chicago Grain Trimmers Association, the employer of Banks,

and the New Amsterdam Casualty Company, its compensation insurance carrier. After considering cross-motions for summary judgment, the district court entered judgment affirming the decision of the deputy commissioner. The court held that the deputy commissioner's findings were supported by substantial evidence in the administrative record and that his decision and award were in accordance with law.

Three issues have been presented in this appeal: (1) whether substantial evidence supports the finding of the deputy commissioner that an injury to the deceased employee during the course of his employment resulted in his death; (2) whether the entry of a remittitur by the administratrix of the deceased employee's estate in a third-party wrongful death action without the employer's consent constitutes a "compromise" within the meaning of the act, barring a claim for death benefits; and (3) whether a prior decision of the deputy commissioner that an injury allegedly sustained by the employee in the course of his employment did not result in his death bars a subsequent claim that a different injury sustained by the employee while at work resulted in his fatality. Because we are convinced that the plaintiffs should prevail on the third issue, our discussion will be confined to that point.

At the time of his death on February 12, 1961, John J. Banks was an employee of the Chicago Grain Trimmers Association. He had worked as a grain trimmer since 1934, loading and unloading grain-carrying barges and vessels. In the late afternoon of January 30, 1961, after returning from work, Banks was standing at the head of the basement stairs in his home. Suddenly he pitched forward, falling eleven steps. His head struck the concrete floor, causing injuries that resulted in death thirteen days later.

The first claim for compensation benefits, filed on February 20, 1961 by the widow, Agnes Banks, for herself and her minor children, alleged that Banks sustained an accidental injury at work on January 26, 1961 which caused his fall at home on January 30, thereby incurring other injuries which resulted in death. At the hearing on this claim there was testimony that the deceased was struck

by a cable on January 26 while working on a barge. Other witnesses, including several coworkers, testified that they did not see Banks suffer any accidental injury on that date and that during the subsequent three days he did not complain of illness. The deputy commissioner found that Banks died as a result of injuries incurred by the fall in his home, but that the evidence failed to establish that the fall was the consequence of an injury arising in the course of his employment. The claim for compensation was rejected.

On August 22, 1961, a second claim was filed by the widow in behalf of herself and her minor children alleging that Banks sustained an accidental injury on January 30, 1961 while working on a barge, which caused fatal injuries in his home on the same date. Shortly thereafter, the widow, as administratrix of her husband's estate, brought a wrongful death action in the federal district court against the Norris Grain Company.[1] She claimed that Norris was responsible for the breaking of a rope (which was stretched from a barge to a tower adjacent to one of its grain elevators) on January 30, 1961 which struck her husband on the head, eventually resulting in his death. The jury returned a verdict in her favor.[2]

Over the objection of the Grain Trimmers Association and its insurer, the deputy commissioner thereafter proceeded to entertain the second claim for compensation. Although jurisdiction to hear this application was challenged because of the prior finding that death had not resulted from employment, the deputy commissioner concluded that a hearing was justified because the claim concerned a different date of injury than that alleged previously. At this second hearing both parties presented testimony relating to the alleged occurrence of an accidental

[1] The complaint filed in the case at bar alleged that on September 21, 1961 at a pre-trial conference held by the deputy commissioner, counsel for the claimants requested that the hearing on the second claim be postponed pending disposition of the wrongful death action. In his answer, the defendant neither admitted nor denied the allegation.

[2] The verdict was in the amount of $30,000. The Norris Grain Company moved either to set aside the verdict or to grant a new trial. The district court indicated a new trial would be granted unless Mrs. Banks filed a remittitur in the amount of $11,000. The remittitur was filed, and a $19,000 judgment was entered and satisfied.

injury on January 30, 1961.[3] The claimants presented evidence that the rope, stretched from the barge to the tower broke and a "whole pile" fell on Banks' head. Witnesses for the employer denied knowledge of the rope breaking or of any complaint made by the deceased about the alleged incident. At the conclusion of the hearing the deputy commissioner found that the deceased suffered an injury while at work on January 30, 1961 producing an acute subdural hematoma, which caused him to fall down a flight of steps in his home two hours later. The deputy commissioner proceeded to make the compensation award challenged by the plaintiffs in the instant proceeding.

Turning to the question before us, both claims filed by the widow for herself and her minor children sought benefits under the compensation act for the death of the husband as the result of injuries sustained in his home. The only difference in the claims is that initially an accidental injury during employment on January 26 was asserted as being the cause of Banks' fall, whereas in the subsequent claim a predisposing accidental injury was alleged to have occurred on January 30, both in 1961. In the first hearing the evidence was directed to an alleged incident on January 26; in the second it was confined to the alleged incident on January 30. Although the claims presented different factual issues, these particular issues were intermediary to a determination of whether there was a causal relationship between the deceased's employment and the fatal fall in his home. The fall and the resulting injury and death were the ultimate occurrences upon which both asserted claims depended. This identity of ultimate issues constituted a single claim for compensation rather than two separate ones.

An analogous situation was present in *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927). There a seaman employed aboard a vessel was injured by the fall of a strongback used to support a portion of a hatch. A libel was filed in

[3] No mention was made of the alleged January 30 incident at the hearing on the first claim. The widow testified at the hearing on the second claim that in February 1961 (prior to the first hearing) her son told her of a rope-falling incident at work on January 30 and that it was discussed by the family and with her attorney. She stated that she did not mention the January 30th injury at the first hearing, however, because "it was forgotten about, and it wasn't until even after the other trials," that she remembered having been told of the injury.

admiralty alleging that the injury was caused by negligence in failing to provide a safe place to work and to use reasonable care and by the unseaworthiness and the insufficiency of gear and tackle, and, in the alternative, if no negligence was established, for maintenance and cure. The federal district court found that the accident was not due to the negligence alleged, that is, the faulty design and construction of certain gear, but to the grossly negligent manner in which dunnage was removed from the hold. The court denied full indemnity by way of damages but awarded the cost of maintenance and cure. In a subsequent suit, the plaintiff sought recovery under the Jones Act alleging negligence of the ship's officers and employees in handling seaworthy gear. The plaintiff was awarded damages in the district court. The circuit court of appeals affirmed, but the Supreme Court reversed. In the course of its opinion, the Court first defined res judicata as follows:

> The effect of a judgment or decree as *res judicata* depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. 274 U.S. at 319.

Then, after referring to the opinion of the lower court that there was no identity of the causes of action because the grounds of negligence pleaded were "distinct and different in character," the Court declared:

> Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.

> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. "The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*'" *Ibid.*

In the instant case the two events which were alleged to have occurred during the decedent's employment resulted in but one actionable ground for compensation benefits, the fatal fall in the home, even though those events were distinct as to time and character. If the decedent had been struck on the head by a cable and seconds later had suffered a similar injury by a falling rope and the occurrences whether singly or in combination had caused his fall, the analogy of these supposed events with the several and distinct acts of negligence referred to in *Phillips* would be more obvious. Accordingly, it was incumbent upon the claimants to assert in one claim all the incidents of employment which singly or in combination were alleged to have caused the fall in the home.

It would seem that this determination should call for an application of the doctrine of res judicata so as to bar the second claim. Although the defendant makes some effort to distinguish the issues because of the difference in the alleged predisposing injuries, his principal contention is that res judicata should not be applied because of the administrative nature of the proceeding. He maintains that the doctrine ordinarily has no application to decisions of administrative agencies, citing among other cases, *Churchill Tabernacle* v. *FCC*, 160 F.2d 244 (D.C. Cir. 1947), and *Niagara Mohawk Power Corp.* v. *FPC*, 202

F.2d 190 (D.C. Cir. 1952), *aff'd*, 347 U.S. 239 (1954). As a corollary it is argued that this ought to be true particularly with respect to administrative actions in claims for workmen's compensation because policy considerations which may have influenced this type of legislation outweigh the need to put an end to litigation of the same issues between the same parties.[4]

There are many administrative decisions as to which res judicata does not apply, for reasons peculiar to the nature and subject matter of many administrative proceedings. In such cases the reasons underlying the doctrine are either not relevant or outweighed by other considerations, as an examination of the cases cited by the defendant will demonstrate. *Churchill Tabernacle* v. *FCC, supra,* for example, concerned the renewal of a license to operate a radio station. The court held that the Commission "is empowered to establish a new policy, and apply it to the renewal of an old license, despite the fact it is inconsistent with a previous decision. This follows from the statutory duty of the Commission to examine each application for renewal of license as an original proceeding and grant or refuse it in the public interest." 160 F.2d at 246. In *Niagara Mohawk Power Corp.* v. *FPC, supra,* the court refused to apply res judicata to an earlier decision by the Federal Power Commission (which the court characterized as an order that "amounted to nothing more than a refusal to agree to the licensee's proposal that the license be amended") on the principal ground that the prior administrative action was unreviewable.

On the other hand, there are many cases holding that res judicata should be applied to administrative decisions when there are justifiable circumstances present. For example, it has frequently been held that the decisions of

[4] The defendant asserts that Congress was so concerned with resulting inequities if full res judicata effect were given to compensation decisions under the act, that it amended section 22 of the statute, 33 U.S.C. § 922, to permit review of a compensation claim "because of a mistake in a determination of fact by the deputy commissioner" at any time prior to one year after its rejection. The defendant concedes that the provision has no direct application to this case because "the Deputy Commissioner was not aware of the January 30 injury until more than 'one year after the rejection' of the first claim." In any event, the section is inapplicable to this case because the claimants at no time disputed the findings of fact made by the deputy commissioner at the first hearing. *Flamm* v. *Hughes*, 329 F. 2d 378, 380 (2d Cir. 1964).

the Tax Court, an administrative agency, may be res judicata. *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948); *Fairmount Aluminum Co.* v. *Commissioner*, 222 F.2d 622 (4th Cir. 1955); *Lynch* v. *Commissioner*, 216 F.2d 574 (7th Cir. 1954). A determination of the National Bituminous Commission that a producer's coal was "bituminous," which had the collateral effect of subjecting the producer to a certain tax, was held to be res judicata in a suit to enjoin the collection of the tax. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940). The doctrine was applied to an Interstate Commerce Commission decision in *Seatrain Lines, Inc.* v. *Pennsylvania R.R.*, 207 F.2d 255 (3d Cir. 1953). On this subject Professor Davis states, "The authorities that administrative determinations may be res judicata are much stronger and much more numerous than the authorities to the contrary."[5]

The problem, however, is to determine when an administrative finding is res judicata and when it is not. A number of tests have been suggested and applied.[6] It seems that no single test has evolved. One approach is to inquire whether the particular administrative proceeding under examination was essentially "judicial" in nature rather than "administrative." *Fairmount Aluminum Co.* v. *Commissioner*, *supra* at 627. Although this approach has been criticized,[7] it occurs to us that it is the most logical one to apply in the instant case. The ultimate factual issues would be the same whether presented in a claim for compensation under the act or in a wrongful death action filed in a court of law. Therefore the administrative process in this case was essentially judicial. Again we quote Professor Davis: "That the doctrine of res judicata should be applied in full force to some administrative action seems clear beyond question. The doctrine is at its best as it applies to an adjudication of past facts, where the second proceeding involves the same claim or the same transaction."[8] Here an adjudication of past events was required and, as we have demonstrated, the claims as to ultimate issues were identical.

---

[5] 2 DAVIS, ADMINISTRATIVE LAW 554 (1958).

[6] See Schopflocher, *The Doctrine of Res Judicata in Administrative Law*, WIS. L. REV. 1-42, 198-235 (1942).

[7] *Id.* at 38.

[8] 2 DAVIS, ADMINISTRATIVE LAW 559 (1958).

That a primary purpose of workmen's compensation legislation is to give greater protection and security to the employee and his dependents against injury or death occurring during employment and to remove the necessity of proving fault or negligence is not a sufficient reason to abrogate entirely the application of res judicata in compensation proceedings. Indeed the doctrine has been applied to the award as well as to the denial of claims under state workmen's compensation acts with respect to whether injury or death occurred during employment. *Trupasso* v. *McKie Lighter Co.*, 79 F.Supp. 641 (D. Mass. 1948); *French* v. *Rishell*, 40 Cal. 2d 477, 254 P.2d 26 (1953); *Hannah* v. *Oklahoma State Highway Comm'n*, 172 Okla. 221, 45 P.2d 53 (1935); *Doca* v. *Federal Stevedoring Co.*, 116 N.Y.S. 2d 25 (1952), *aff'd*, 305 N.Y. 648, 112 N.E.2d 424 (1953).

In summary, we hold that the deputy commissioner should not have entertained the second claim because it was barred by res judicata.

The judgment of the district court is reversed.

LIBRARY
SUPREME COURT, U. S.

FILED
MAR 4 1967
JOHN F. DAVIS, CLERK

No. 1119
5-8

In the Supreme Court of the United States

OCTOBER TERM, 1966
7

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents,

vs.

R. C. ENOS, Deputy Commissioner,

and

AGNES M. BANKS, widow of JOHN J. BANKS, deceased, and representative of JAMES M. BANKS, JANICE BANKS, AND CATHERINE M. BANKS, minor children of JOHN J. BANKS, deceased,
Petitioner.

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HAROLD A. LIEBENSON
77 West Washington Street
Chicago, Illinois 60602
RAndolph 6-9242
Attorney for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Conclusion	18
Finding of Fact and Conclusions of Law of District Court	11a
Opinion of Court Below	1a-10a
Order of District Court on Petition to Intervene	13a
Petition	1, 2
Questions Presented for Review	2, 3
Raising the Federal Question	7
Reasons for Granting Writ of Certiorari	7-17
Reference to Reports of Opinions	2
Statement of the Case	4-7
Statutes and Regulations Involved	3, 4

List Of Authorities Cited.

Cases.

American Mutual Liability Ins. Co. of Boston v. Lowe, 85 F. 2d 625 (C.A. 5 1936) 8, 12, 14

Bethlehem S. B. Corp. v. Cardillo, 102 F. 2d 299 (C.A. 1 1939) 8

Calbeck v. A. D. Suderman Stevedoring Co., 290 F. 2d 308 (C.A. 5 1961) 16

Candado Stevedoring Corp. v. Willard, 185 F. 2d 232 (C.A. 2 1950) 8, 12, 14

Flamm v. Hughes, 329 F. 2d 378 (C.A. 2 1964) 14

International U. United A.A. & A.I.W. v. Scofield, 86 S. Ct. 373 (1965), 382 U.S. 205 ..... 8, 11

PAGE

Jarka Corp. v. Hughes, 299 F. 2d 534 (C.A. 2 1962) ..8, 16

Maryland Cas. Co. v. Cardillo, 99 F. 2d 432 (C.A. D.C. 1938) 8

Seaboard Marine Repair Co. v. Cardillo, 166 F. 2d 431 (C.A. 2 1948) 8, 12, 14

Stansfield v. Lykes Bros. S.S. Co., 124 F. 2d 999 (C.A. 5 1942) 16

Tudman v. American Ship Bldg. Co., 170 F. 2d 842 (C.A. 7 1948) 16

U. S. Casualty Co. v. Taylor, et ux, 64 F. 2d 521 (C.A. 4 1933) 10

Vendemia v. Christaldi, 221 F. 2d 103 (C.A. D.C. 1955) 12

Voris v. Eikel, 346 U.S. 328 (1953) 12

STATUTES.

Longshoremen's and Harbor Workers' Compensation Act

Sec. 22 (33 U.S.C. 922) 3, 4

Sec. 21 A (33 U.S.C. 921a) 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., AND NEW AMSTERDAM CASUALTY COMPANY,

Respondents,

vs.

R. C. ENOS, Deputy Commissioner,

and

AGNES M. BANKS, widow of JOHN J. BANKS, deceased, and representative of JAMES M. BANKS, JANICE BANKS, AND CATHERINE M. BANKS, minor children of JOHN J. BANKS, deceased,

Petitioner.

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Agnes M. Banks, widow of John J. Banks, deceased, and representative of James M. Banks, Janice M. Banks, and Catherine M. Banks, minor chil-

dren of John J. Banks, deceased, prays for leave to intervene, and further prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that court in reversing the award rendered in favor of your petitioner and her minor children. R. C. Enos, Deputy Commissioner of the United States Department of Labor, under the Longshoremen's and Harbor Workers' Compensation Act, and in reversing the findings of fact and conclusions of law of the District Court Judge James B. Parsons, which affirmed the award of R. C. Enos, wherein a harbor worker,. was injured on January 30, 1961 and subsequently died as a result of said injuries, on February 12, 1961.

A. REFERENCE TO REPORTS OF OPINIONS.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in full in Appendix 1A. The findings of fact and the conclusions of law of the district court judge are reported in full in Appendix 1B.

B. STATEMENT OF JURISDICTIONAL GROUNDS.

The decision of the Court of Appeals for the Seventh Circuit was rendered on July 13, 1966. The petition for rehearing was denied by that court on October 6, 1966. A motion to extend time for the filing of a writ of certiorari to March 5, 1967, was allowed by Justice Tom C. Clark on January 4, 1967. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C., Sec. 1254 (1).

C. QUESTIONS PRESENTED FOR REVIEW.

1. Do the claimants', widow and minor children, of a deceased Harbor Worker, have sufficient legal interest to present a petition for a writ of certiorari, when the U. S.

Attorney, who represented the Longshoremen's and Harbor Workers' Deputy Commissioner, pursuant to Title 33 U.S.C. Sec. 921 a, thereafter refused to proceed with such petition wherein claimants had been allowed an award for the death of the deceased Harbor Worker by the Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, which award was subsequently affirmed by the district court judge, and thereafter reversed by the United States Court of Appeals?

2. Where under title 33 U.S.C. 922, the Deputy Commissioner in a case under the Longshoremen's and Harbor Workers' Compensation Act, has the power to issue a new order based on his own initiative or upon application of any other party in interest, because of mistake in determination of facts, is not contrary to said statute to invoke the doctrine of res judicata and deny the Deputy Commissioner that power especially where a timely petition had set forth facts of a new occurrence that caused the Harbor Worker's death and was the sole basis for the new order granting an award for the death of said Harbor Worker?

D. STATUTES AND REGULATIONS INVOLVED.

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1437, as Amended:

33 U.S.C. 921 a

> "In any court proceedings under section 921 of this title of other provisions of this chapter, it shall be the duty of the United States attorney in the judicial district in which the case is pending to appear as attorney on behalf of the Secretary of Labor or his deputy commissioner when either is a party to the

case or interested, and to represent such Secretary or deputy in any court in which such case may be carried on appeal."

33 U.S.C. 922 (Section 22 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1437, as amended) provides in pertinent part:

> "Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation."

E. STATEMENT OF THE CASE.

Decedent, John J. Banks, employed by the Chicago Grain Trimmers Association, Inc., as a grain trimmer since 1934, which involves the loading and unloading of grain from barges and vessels, to and from various located grain elevators, with port locations and grain elevator locations varying from day to day, depending on traffic (incoming and outgoing).

On January 30, 1961, at approximately 4:45 P.M., upon arrival at his home from work and while at head of basement steps, he suddenly fell forward, with his arms at his sides striking the concrete floor approximately 10 steps down, at no time crying out or attempting to arrest his fall and thereby being rendered unconscious without

ever regaining his consciousness and expiring on February 21, 1961.

A claim was filed under the Longshoremen's and Harbor Workers' Compensation Act for compensation benefits on February 20, 1961, as number 46-71, alleging an accidental injury at work on January 26, 1961, which caused his fall on January 30, 1961. There were no eye witnesses to this occurrence and no testimony given regarding this accident except for some incomplete hearsay statements. The only possible evidence of any injury alleged to have accidentally occurred on January 26, 1961, was a little black speck on decedent's forehead. The Deputy Commissioner found that as a result of the evidence presented with relation to the *accident of January 26, 1961, that it was not established that the employee's death was the result of an injury which arose out of the course of his employment on January 26, 1961.* (A-10) This finding was made on June 8, 1961.

Subsequent to June 8, 1961 the claimant was notified that there was a witness to an accident which took place on January 30, 1961, at 2:30 P.M. (two hours prior to his fall from the top of the steps at home.) At the hearing of the first claim involving the alleged occurrence the eyewitness, Mike Miramontez, to the second occurrence was unknown to the claimant but was known to the respondent insurance company which had a statement from Mike Miramontez which told them about the occurrence of January 30, 1961, but this information was withheld by them from the Deputy Commissioner and the claimant. This witness was contacted and subsequent thereto another claim (46-73) was filed (within 1½ months subsequent to the rejection of the first claim) before the Longshoremen's and Harbor Workers' Commission alleg-

ing that John Banks was injured on January 30, 1961, which injury caused his death. This claim was filed on August 22, 1961. The respondent filed two forms in response to this claim. In both forms they assert the claim of res judicata because of the prior finding. (A. 101, 102) The second case was heard by the same Deputy Commissioner. After the second hearing he issued an award in favor of the claimants finding that the injury and death arose out of and in the course of his employment as a result of the accident of *January 30, 1961.* It is important to illustrate the salient features of each occurrence.

Accident 1	Accident 2
Date:	
January 26, 1961	January 30, 1961
Place:	
Gateway Elevators (A90) 127th & Calumet (A91) Chicago, Illinois	Norris Elevators (A23) 98th & Calumet River Chicago, Illinois
Eyewitnesses: None	Mike Miramontez (A23)
Time:	
Unknown	2:00 P.M. (A23)
Type of work:	
Button man (A8)	Tripper (A23)
How injured:	
Allegedly struck by steel cable in forehead. (Hearsay) (A 8, 91)	Struck on top of head by rope falling 50 feet weighing about 30 pounds. (A25)
Visual injury:	
Little black spot on forehead (A91)	Constant rubbing of head (A 24)

An action was filed in the United States District Court to set aside and enjoin the enforcement of the award of the deputy commissioner. The claimants were not represented in this hearing. Cross motions for summary judgment were filed with the district court and on June 2, 1965, the district judge adopted the findings of fact and conclusions of law filed on behalf of the Deputy Commissioner. An appeal was taken to the Court of Appeals (CA-7) who ruled that the original hearing relating to the alleged accident of *January 26, 1961,* was res judicata as to the accident of *January 30, 1961.*

F. THE RAISING OF THE FEDERAL QUESTION.

This petition is to review an order issued by the United States Court of Appeals for the Seventh Circuit, reversing an order of the United States District Court trial judge.

G. PROCEEDING IN FEDERAL COURTS.

The proceedings in the Federal Court is covered under the section on Statement of the Case.

H. REASONS FOR GRANTING WRIT OF CERTIORARI.

The opinion of the United States Court of Appeals for the Seventh Circuit in this cause greatly affects the practice of all cases involving the Longshoremen's and Harbor Workers' Compensation Act. It interprets a federal statute in derrogation of the intended purpose of said statute and contrary to the meaning that was given said statute by Congress.

The decision which is the subject of this Petition for a Writ of Certiorari involves the following conflicts, interpretations and rulings of other courts of appeals:

1. That the provision of the statute 33 U.S.C. 922 has no application to the facts in this matter.

Candado Stevedoring Co. v. *Willard,* 185 F. 2d 232 at 233 (2d Cir. 1950).

American Mut. Liability Co. v. *Lowe,* 85 F. 2d 625, at 627 and 628 (C.A. 3rd Cir. 1936).

Seaboard Marine Repair Co. v. *Cardillo,* 166 F. 2d 431, at 432 (C.A. 2d Cir. 1948).

2. The doctrine of res judicata as a bar to modification of an existing order is inconsistent with intent and meaning of. 33 U.S.C. 922.

Jarka Corporation v. *Hughes,* 299 F. 2d 534 (C.A. 2nd Cir. 1962).

Bethlehem S. B. Corp. v. *Cardillo,* 102 F. 2d 299, at 304 (C.A. 1st Cir. 1939).

Maryland Cas. Co. v. *Cardillo,* 99 F. 2d 432, at 434 (C.A. D.C. Cir. 1938).

3. The question of whether or not claimant petitioner, who was granted an award for death of husband Harbor Worker under (33 U.S.C. 901 et. seq.) and which award was affirmed by the District Court and subsequently reversed by the Court of Appeals (CA-7) and where U. S. Attorney refused to proceed further, has sufficient legal interest to be granted the right to file a Writ of Certiorari before the Superior Court has never been ruled on.

International U. United A.A. & A.I.W. v. *Scofield,* 86 S. Ct. 373 (1965).

AS TO THE RIGHT OF PETITIONER TO INTERVENE.

During the proceedings before the Deputy Commissioner arising out of the accident of January 30, 1961, claimants were represented by Harold A. Liebenson, the attorney representing the petitioner herein. After the award was granted in favor of the claimants the respondents instituted an action in the United States District Court against the Deputy Commissioner. Under 33 U.S.C. 921 a, the Deputy Commissioner, was represented by the United States Attorney's office. When the award was affirmed there was an appeal to the United States Court of Appeals for the Seventh Circuit. In this proceeding the Deputy Commissioner was again represented by the United States Attorney's Office, who in effect, was representing the claimants in that they were seeking to have the award affirmed. However, the Court of Appeals reversed the award and denied the Petition for Rehearing filed on behalf of the Deputy Commissioner. The attorney for the claimants who obtained the award then requested the United States Department of Justice who participated with the United States Attorney's office in the appeal to please seek a Writ of Certiorari thereby protecting the rights of the claimants. This request was denied on the last day for filing a petition for a writ of certiorari thereby foreclosing the rights of the petitioner. Motion was made to the United States Supreme Court to extend the time to file a Writ of Certiorari, which motion was allowed. Claimants through their attorney made a motion to intervene in the United States District Court in order to present the Petition for a Writ of Certiorari. This motion was denied by the United States District Judge on the basis that he had no jurisdiction over the matter. A copy of this order is attached as *Appendix I C.*

After the District Judge refused to grant the claimants leave to intervene the attorney for the claimants consulted with the United States Court of Appeals and was informed that the Mandate had been issued and that the court lost jurisdiction of the matter. The claimants have no alternative other than to present their Petition for Leave to Intervene and to present the Petition for a Writ of Certiorari at the same time. If the claimants are not granted leave to intervene they will be without remedy because of the United States Attorneys office refused to further protect their rights via appeal. Petitioner had not intervened prior to this time because she assumed that it was unnecessary to incur court costs and attorney's fees in that she felt that their rights were adequately represented by the United States Attorney's Office and the Department of Justice, pursuant to 33 U.S.C. 921 a. For the first time petitioner is placed in a position where she must act at all costs to protect her equity. By not going further, all is lost. This cannot happen under the above circumstances.

In view of the statutory's representatives refusal to act in reality creates a paradoxical situation in that such lack of action results in being the decision as though that of the court or jury, or both without any recourse whatsoever thus completely foreclosing the statutory benefits to the decedent's widow and his minor children. Therefore shouldn't the petitioner as a last resort be granted a right to file her writ in this court as a last resort where the proper authority has refused to act?

Your petitioner has found no case decided by the United States Supreme Court on the right to intervene in a proceeding in a lower court where an insurance carrier sought to intervene in the case of *U.S. Casualty Co.* v. *Taylor et ux,* (4th Cir., 1933) 64 F. 2d 521, at 526 the

court said, "The injured employee, the employer, and carrier are all clothed with a sufficient interest to intervene as a matter of cause, under the established practice prevailing in equity; and it cannot be supposed that it was the intent of Congress to forbid this just procedure merely because it failed expressly to authorize the joining of the successful party before the deputy commissioner as a defendant in a subsequent suit."

In the case of *International U., United A.A. & A.I.W.* v. *Scofield,* 382 U.S. 205, 86 S. Ct. 373 (1965) with reference to the right of a union to first intervene in the Court of Appeals, the Supreme Court allowed said intervention on the part of the unions who first applied for intervention in the Court of Appeals. The reasoning of this court in that case is even more applicable to this situation where the claimants are deprived of a monetary award for the death of a husband and father.

Claimants contend that they should now have the right to intervene to present this Petition for Writ of Certiorari.

AS TO SEC. 22 (TITLE 33 U.S.C. 922) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Section 22 (33 U.S.C. 922) of the Longshoremen's and Harbor Worker's Compensation Act has the purpose of protecting all parties for a period of one year subsequent to an award by a Deputy Commissioner. It is liberal with good reason. The Deputy Commissioner is not a lawyer. Many parties who present claims are not represented by lawyers. The Deputy Commissioner does not make findings of fact and conclusions of law as contemplated by 5 U.S.C. 1007 (b) in law suits. The absence of such

findings on undisputive evidence does not require a remand of either administrative or court decisions. *Vendemia* v. *Christaldi,* 221 F. 2d 103, 106 (C.A. D.C. Cir. 1955)

Under Sec. 22, the application of any party in interest should be filed within the one year period, but that does not mean that the deputy commissioner need decide the matter within one year of the prior decision. *Candado Stevedoring Corp.* v. *Willard,* 185 F. 2d 232, at 233 (C.A. 2d Cir. 1950); *American Mutual Liability Ins. Co. of Boston* v. *Lowe,* 85 F. 2d 625, at 627-628 (5th Cir. 1936); *Seaboard Marine Repair Co.* v. *Cardillo,* 166 F. 2d 431, at 432 (2nd Cir. 1948). In the case at bar, the first decision for the alleged occurrence of January 26, 1961, of the Deputy Commissioner denying benefits was rendered on June 8, 1961 (A. 10) The second application was filed 1½ months later, on August 22, 1961, for the accident of January 30, 1961. (A. 18) The deputy commissioner's award was timely under the law cited above because it was pertinent to the accident of January 30, 1961.

In the case of *Voris* v. *Eikel,* 346 U.S. 328, at 333 (1953) this Court said, "This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results". In the case of *Candado Stevedoring Corp.* v. *Willard, supra,* 185 F. 2d 232 at 233, the court said, "that the applicant called the paper he filed a 'claim for compensation' instead of an 'application' for review is of no moment." In the light of the facts involved in this case the respondents knew at the time of the original hearing that John Banks was hurt on January 30, 1961. This was substantiated by a written eye-witness statement in their possession which fully informed them of the occurrence of January 30, 1966. Said respon-

dants knowingly withheld said information from the Deputy Commissioner and from the claimants at the first hearing. Neither the claimants nor the Deputy Commissioner were apprised of the existence of said witness or the details of said occurrence at the time of the first hearing. When the information became available, approximately one month after the award denying benefits to the claimant, petitioner then filed the new application because it pertained to a different date and a different place than the first claim. The respondents immediately, in its pleadings, placed in issue the first case when they alleged the defense of "res judicata". The same Deputy Commissioner heard the facts of the second occurrence. He heard and saw the eye witness to the second occurrence. He found sufficient evidence and reason for the decedent to keel over two hours after he was hit on the top of the head with a weight of 30 pounds. It was not the same as in the first hearing where there were no witnesses to the occurrence; where the only injury was a speck on his forehead; where the man worked 3 days after the first occurrence. Does it matter that the deputy commissioner considered this as a different case or a rehearing? He knew at all times of the defense of "res judicata". He considered the difference between both cases. He knew that the respondent withheld the facts of the accident of January 30, 1961 at the time of the first hearing. Did it or should it make a difference that the application was labeled incorrectly? The fact is that within one year of the rejection of the first claim another claim was filed wherein it was alleged and proven before the same commissioner who heard the first case that the decedent harbor worker was hurt in the course of his employment which caused his death. Isn't this the type of situation that Congress must have had in mind to

protect the layman deputy commissioner and the longshoremen and harbor workers? Should the sophisticated insurance carrier be permitted to take advantage of a defense of "res judicata" in a situation such as this?

The case of *Candado Stevedoring Co.* v. *Willard,* 185 F. 2d 232 at 233, (C.A. 2d Cir. 1950) holds that it makes no difference whether the application is labeled "claim for compensation" or "petition for rehearing" as long as the application is filed within one year after the rejection of a claim. Nor must the case be decided in the one year period as long as the application is filed within the one year period following rejection of a claim the limitation statute is tolled. In accord are the cases of *American Mutual Liability Ins. Co. of Boston* v. *Lowe,* 85 F. 2d 625 at 627-628 (C.A. 5th Cir. 1936); and *Seaboard Marine Repair Co.* v. *Cardillo,* 166 F. 2d 431 at 432 (C.A. 2nd Cir. 1948).

In its opinion in this matter the Court of Appeals (C.A. 7) cites two reasons why Sec. 22 is not applicable: 1. The deputy commissioner was not aware of the January 30, 1961 injury until more than one year after the rejection of the first claim of January 26, 1961; and 2. This section is inapplicable to this case because the claimants at no time disputed the findings of fact made by the deputy commissioner for the first occurrence of January 26, 1961.

The first reason given for the inapplicability of Sec. 22 by the court is clearly erroneous in that the application was filed within 1½ months following the rejection of the claim (A. 18) and not more than one year as stated in the opinion of the court.

The court relied upon the case of *Flamm* v. *Hughes,* 329 F. 2d 378 at 380 (C.A. 2nd Cir. 1964) as the basis of its

reasoning that Sec. 22 is inapplicable because there was no disputing of facts within 30 days following the rejection of the first claim. The *Flam* case is clearly inapplicable in that Sec. 22 was not involved at all. In that case there was a request on the part of a widow to have the deputy commissioner reconsider his decision awarding benefits to her husband during his lifetime, said benefits were payable for the remainder of his life. After the death of her husband she sought additional compensation for herself. The sole basis of her lawsuit was that the Longshoremen's and Harbor Workers' Compensation Act was unconstitutional. There was no additional hearing in which additional evidence was heard. She did not claim that the deputy commissioner erred in applying the statute or that the evidence was incorrect. She did not seek to have Sec. 22 apply because she had no change in facts or conditions to present to the deputy commissioner. In the case at bar there were additional facts and witnesses presented showing a change which proved that there was a mistake in the determination of the facts and a change in the conditions. Though the petition was not expressly labeled "petition for rehearing" the deputy commissioner knew that it was in that he had heard the original case, and knew of the contention of res judicata by the respondent. No evidence of the January 30, 1961 injury could have been presented on behalf of the claimants at the original hearing because the claimants knew of no witnesses at that time to present them to the deputy commissioner. However, the respondents knew of such witnesses and withheld this knowledge from the deputy commissioner and the claimants.

The reviewing court in its opinion seems to indicate that the claimant must file a petition within 30 days disputing the findings of fact of the deputy commissioner as

a prerequisite to having Sec. 22 apply. (F.N. p. 7 of opinion) This is clearly erroneous. If this interpretation was correct it would negate the purpose of Sec. 22. Sec. 22 was expressly intended to authorize the deputy commissioner to consider newly presented evidence after a previous determination of facts has become final in 30 days. It takes effect after the 30 day period when the deputy commissioner's findings are not contested and thus become final. The whole purpose of this section is to prevent the application of the doctrine of res judicata. Cases in support of the position that Sec. 22 applies after the 30 day period in which the findings of the deputy commissioner becomes final are: *Tudman* v. *American Ship Bldg. Co.*, 170 F. 2d 842 at 844 (C.A. 7th Cir. 1948); *Stansfield* v. *Lykes Bros. S. S. Co.*, 124 F. 2d 999 at 1004 (C.A. 5th Cir. 1942); *Calbeck* v. *A. D. Suderman Stevedoring Co.*, 290 F. 2d 308 at 309 (C.A. 5th Cir. 1961); *Jarka Corporation* v. *Hughes*, 299 F. 2d 534 (2nd Cir. 1962).

Thus the basis upon which the Court of Appeals rendered its decision denying the applicability of Sec. 22 of the Longshoremen's and Harbor Workers' Compensation Act is unfounded both in law and in fact. It contradicts other decisions of other federal circuits, thereby creating a conflict which can affect the great volume of claims filed under the Longshoremen's and Harbor Workers' Compensation Act. What makes it more serious is that in most instances the deputy commissioners' who have to interpret the effect of this decision will not be legally trained to adequately evaluate this decision in light with other existing conflicting decisions among the various circuits.

If this decision is not overruled, there will be considerable conflict among the Federal circuits on the questions of:

1. Whether or not the doctrine of res judicata can be applied during the one year period while section 22 of the Act 33 U.S.C. 922 is applicable;

2. Whether a petition for a rehearing must be filed within 30 days after an award by a Deputy Commissioner before section 22 can be applied;

3. Whether a claim must be specifically labeled with the magic words of "Petition for Rehearing" or "Petition for Review" before section 22 can be applicable;

4. Whether a Deputy Commissioner has the right to review a case under section 22 unless it is properly labeled;

5. Whether the Longshoremen's and Harbor Workers' Compensation Act is to be given liberal or strict interpretation;

6. Whether one occurrence on a separate place, date, time and circumstances can be res judicata for another factual occurrence;

7. How can it be said that an interested party who knowingly and willfully withheld pertinent information before the forum or court is "with clean hands" in an equity proceeding especially when such withholding of information is by design to defeat the claim.

CONCLUSION.

For the foregoing reasons we urge this court to grant the petitioner leave to intervene, to file this petition for a Writ of Certiorari, and to issue its Writ of Certiorari to the United States Court of Appeals for the 7th Circuit, to the end that the order of that Court may be reviewed.

Respectfully submitted,

HAROLD A. LIEBENSON
77 West Washington Street
Chicago, Illinois 60602
726-9242
Attorney for Petitioner
Agnes M. Banks

APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15342 SEPTEMBER TERM, 1965 APRIL SESSION, 1966

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., and NEW AMSTERDAM CASUALTY COMPANY,
Plaintiffs-Appellants,
v.
R. C. ENOS,
Deputy Commissioner,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 13, 1966

Before DUFFY, KNOCH, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* A determinative question presented in this appeal is whether the doctrine of res judicata should be applied to a claim for compensation death benefits filed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, because of an administrative denial of a prior claim filed by the same dependents seeking similar relief.

This action was instituted under section 921 of the act to set aside an order of the deputy commissioner, Department of Labor, dated January 27, 1964, granting compensation death benefits to the widow and minor children of John J. Banks, deceased. The plaintiffs are the Chi-

cago Grain Trimmers Association, the employer of Banks, and the New Amsterdam Casualty Company, its compensation insurance carrier. After considering cross-motions for summary judgment, the district court entered judgment affirming the decision of the deputy commissioner. The court held that the deputy commissioner's findings were supported by substantial evidence in the administrative record and that his decision and award were in accordance with law.

Three issues have been presented in this appeal: (1) whether substantial evidence supports the finding of the deputy commissioner that an injury to the deceased employee during the course of his employment resulted in his death; (2) whether the entry of a remittitur by the administratrix of the deceased employee's estate in a third-party wrongful death action without the employer's consent constitutes a "compromise" within the meaning of the act, barring a claim for death benefits; and (3) whether a prior decision of the deputy commissioner that an injury allegedly sustained by the employee in the course of his employment did not result in his death bars a subsequent claim that a different injury sustained by the employee while at work resulted in his fatality. Because we are convinced that the plaintiffs should prevail on the third issue, our discussion will be confined to that point.

At the time of his death on February 12, 1961, John J. Banks was an employee of the Chicago Grain Trimmers Association. He had worked as a grain trimmer since 1934, loading and unloading grain-carrying barges and vessels. In the late afternoon of January 30, 1961, after returning from work, Banks was standing at the head of the basement stairs in his home. Suddenly he pitched forward, falling eleven steps. His head struck the concrete floor, causing injuries that resulted in death thirteen days later.

The first claim for compensation benefits, filed on February 20, 1961 by the widow, Agnes Banks, for herself and her minor children, alleged that Banks sustained an acci-

dental injury at work on January 26, 1961 which caused his fall at home on January 30, thereby incurring other injuries which resulted in death. At the hearing on this claim there was testimony that the deceased was struck by a cable on January 26 while working on a barge. Other witnesses, including several coworkers, testified that they did not see Banks suffer any accidental injury on that date and that during the subsequent three days he did not complain of illness. The deputy commissioner found that Banks died as a result of injuries incurred by the fall in his home, but the evidence failed to establish that the fall was the consequence of an injury arising in the course of his employment. The claim for compensation was rejected.

On August 22, 1961, a second claim was filed by the widow in behalf of herself and her minor children alleging that Banks sustained an accidental injury on January 30, 1961 while working on a barge, which caused fatal injuries in his home on the same date. Shortly thereafter, the widow, as administratrix of her husband's estate, brought a wrongful death action in the federal district court against the Norris Grain Company.[1] She claimed that Norris was responsible for the breaking of a rope (which was stretched from a barge to a tower adjacent to one of its grain elevators) on January 30, 1961 which struck her husband on the head, eventually resulting in his death. The jury returned a verdict in her favor.[2]

---

[1] The complaint filed in the case at bar alleged that on September 21, 1961 at a pre-trial conference held by the deputy commissioner, counsel for the claimants requested that the hearing on the second claim be postponed pending disposition of the wrongful death action. In his answer, the defendant neither admitted nor denied the allegation.

[2] The verdict was in the amount of $30,000. The Norris Grain Company moved either to set aside the verdict or to grant a new trial. The district court indicated a new trial would be granted unless Mrs. Banks filed a remittitur in the amount of $11,000. The remittitur was filed, and a $19,000 judgment was entered and satisfied.

Over the objection of the Grain Trimmers Association and its insurer, the deputy commissioner thereafter proceeded to entertain the second claim for compensation. Although jurisdiction to hear this application was challenged because of the prior finding that death had not resulted from employment, the deputy commissioner concluded that a hearing was justified because the claim concerned a different date of injury than that alleged previously. At this second hearing both parties presented testimony relating to the alleged occurrence of an accidental injury on January 30, 1961.[3] The claimants presented evidence that the rope, stretched from the barge to the tower broke and a "whole pile" fell on Banks' head. Witnesses for the employer denied knowledge of the rope breaking or of any complaint made by the deceased about the alleged incident. At the conclusion of the hearing the deputy commissioner found that the deceased suffered an injury while at work on January 30, 1961 producing an acute subdural hematoma, which caused him to fall down a flight of steps in his home two hours later. The deputy commissioner proceeded to make the compensation award challenged by the plaintiffs in the instant proceeding.

Turning to the question before us, both claims filed by the widow for herself and her minor children sought benefits under the compensation act for the death of the husband as the result of injuries sustained in his home. The only difference in the claims is that initially an accidental injury during employment on January 26 was asserted as being the cause of Banks' fall, whereas in the subsequent

---

[3] No mention was made of the alleged January 30 incident at the hearing on the first claim. The widow testified at the hearing on the second claim that in February 1961 (prior to the first hearing) her son told her of a rope-falling incident at work on January 30 and that it was discussed by the family and with her attorney. She stated that she did not mention the January 30th injury at the first hearing, however, because "it was forgotten about, and it wasn't until even after the other trials," that she remembered having been told of the injury.

claim a predisposing accidental injury was alleged to have occurred on January 30, both in 1961. In the first hearing the evidence was directed to an alleged incident on January 26; in the second it was confined to the alleged incident on January 30. Although the claims presented different factual issues, these particular issues were intermediary to a determination of whether there was a causal relationship between the deceased's employment and the fatal fall in his home. The fall and the resulting injury and death were the ultimate occurrences upon which both asserted claims depended. This identity of ultimate issues constituted a single claim for compensation rather than two separate ones.

An analogous situation was present in *Baltimore S.S. Co.* v. *Phillips,* 274 U.S. 316 (1927). There a seaman employed aboard a vessel was injured by the fall of a strongback used to support a portion of a hatch. A libel was filed in admiralty alleging that the injury was caused by negligence in failing to provide a safe place to work and to use reasonable care and by the unseaworthiness and the insufficiency of gear and tackle, and, in the alternative, if no negligence was established, for maintenance and cure. The federal district court found that the accident was not due to the negligence alleged, that is, the faulty design and construction of certain gear, but to the grossly negligent manner in which dunnage was removed from the hold. The court denied full indemnity by way of damages but awarded the cost of maintenance and cure. In a subsequent suit, the plaintiff sought recovery under the Jones Act alleging negligence of the ship's officers and employees in handling seaworthy gear. The plaintiff was awarded damages in the district court. The circuit court of appeals affirmed, but the Supreme Court reversed. In the course of its opinion, the Court first defined res judicata as follows:

> The effect of a judgment or decree as *res judicata* depends upon whether the second action or suit is upon the same or a different cause of action. If upon

> the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. 274 U.S. at 319.

Then, after referring to the opinion of the lower court that there was no identity of the causes of action because the grounds of negligence pleaded were "distinct and different in character," the Court declared:

> Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.
>
> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. "The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or

> indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.'" Ibid.*

In the instant case the two events which were alleged to have occurred during the decedent's employment resulted in but one actionable ground for compensation benefits, the fatal fall in the home, even though those events were distinct as to time and character. If the decedent had been struck on the head by a cable and seconds later had suffered a similar injury by a falling rope and the occurrences whether singly or in combination had caused his fall, the analogy of these supposed events with the several and distinct acts of negligence referred to in *Phillips* would be more obvious. Accordingly, it was incumbent upon the claimants to assert in one claim all the incidents of employment which singly or in combination were alleged to have caused the fall in the home.

It would seem that this determination should call for an application of the doctrine of res judicata so as to bar the second claim. Although the defendant makes some effort to distinguish the issues because of the difference in the alleged predisposing injuries, his principal contention is that res judicata should not be applied because of the administrative nature of the proceeding. He maintains that the doctrine ordinarily has no application to decisions of administrative agencies, citing among other cases, *Churchill Tabernacle* v. *FCC*, 160 F.2d 244 (D.C. Cir. 1947), and *Niagara Mohawk Power Corp.* v. *FPC*, 202 F.2d 190 (D.C. Cir. 1952), *aff'd*, 347 U.S. 239 (1954). As a corollary it is argued that this ought to be true particularly with respect to administrative actions in claims for workmen's compensation because policy considerations which may have influenced this type of legislation outweigh the need to put an end to litigation of the same issues between the same parties.[4]

---

[4] The defendant asserts that Congress was so concerned with resulting inequities if full res judicata effect were given to compensation decisions under the act, that it

There are many administrative decisions as to which res judicata does not apply, for reasons peculiar to the nature and subject matter of many administrative proceedings. In such cases the reasons underlying the doctrine are either not relevant or outweighed by other considerations. as an examination of the cases cited by the defendant will demonstrate. *Churchill Tabernacle* v. *FCC, supra.* for example, concerned the renewal of a license to operate a radio station. The court held that the Commission "is empowered to establish a new policy, and apply it to the renewal of an old license, despite the fact it is inconsistent with a previous decision. This follows from the statutory duty of the Commission to examine each application for renewal of license as an original proceeding and grant or refuse it in the public interest." 160 F.2d at 246. In *Niagara Mohawk Power Corp.* v. *FPC, supra,* the court refused to apply res judicata to an earlier decision by the Federal Power Commission (which the court characterized as an order that "amounted to nothing more than a refusal to agree to the licensee's proposal that the license be amended") on the principal ground that the prior administrative action was unreviewable.

On the other hand, there are many cases holding that res judicata should be applied to administrative decisions when there are justifiable circumstances present. For ex-

---

[4] (Cont.)
amended section 22 of the statute, 33 U.S.C. § 922, to permit review of a compensation claim "because of a mistake in a determination of fact by the deputy commissioner" at any time prior to one year after its rejection. The defendant concedes that the provision has no direct application to this case because "the Deputy Commissioner was not aware of the January 30 injury until more than 'one year after the rejection' of the first claim." In any event, the section is inapplicable to this case because the claimants at no time disputed the findings of fact made by the deputy commissioner at the first hearing. *Flamm* v. *Hughes,* 329 F. 2d 378, 380 (2d Cir. 1964).

ample, it has frequently been held that the decisions of the Tax Court, an administrative agency, may be res judicata. *Commissioner* v. *Sunnen,* 333 U.S. 591 (1948); *Fairmount Aluminum Co.* v. *Commissioner,* 222 F.2d 622 (4th Cir. 1955); *Lynch* v. *Commissioner,* 216 F.2d 574 (7th Cir. 1954). A determination of the National Bituminous Commission that a producer's coal was "bituminous," which had the collateral effect of subjecting the producer to a certain tax, was held to be res judicata in a suit to enjoin the collection of the tax. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381 (1940). The doctrine was applied to an Interstate Commerce Commission decision in *Seatrain Lines, Inc.* v. *Pennsylvania R.R.,* 207 F.2d 255 (3d Cir. 1953). On this subject Professor Davis stated, "The authorities that administrative determinations may be res judicata are much stronger and much more numerous than the authorities to the contrary."[5]

The problem, however, is to determine when an administrative finding is res judicata and when it is not. A number of tests have been suggested and applied.[6] It seems that no single test has evolved. One approach is to inquire whether the particular administrative proceeding under examination was essentially "judicial" in nature rather than "administrative." *Fairmount Aluminum Co.* v. *Commissioner, supra* at 627. Although this approach has been criticized,[7] it occurs to us that it is the most logical one to apply in the instant case. The ultimate factual issues would be the same whether presented in a claim for compensation under the act or in a wrongful death action filed in a court of law. Therefore the administrative process in this case was essentially judicial. Again we quote Professor Davis: "That the doctrine of res judicata should be applied in full force to some administrative action seems clear beyond question. The doctrine is at its

---

[5] 2 DAVIS, ADMINISTRATIVE LAW 554 (1958).

[6] See Schopflocher, *The Doctrine of Res Judicata in Administrative Law,* WIS. L. REV. 1-42, 198-235 (1942).

[7] *Id.* at 38.

best as it applies to an adjudication of past facts, where the second proceeding involves the same claim or the same transaction.'"[8] Here an adjudication of past events was required and, as we have demonstrated, the claims as to ultimate issues were identical.

That a primary purpose of workmen's compensation legislation is to give greater protection and security to the employee and his dependents against injury or death occurring during employment and to remove the necessity of proving fault or negligence is not a sufficient reason to abrogate entirely the application of res judicata in compensation proceedings. Indeed the doctrine has been applied to the award as well as to the denial of claims under state workmen's compensation acts with respect to whether injury or death occurred during employment. *Trupasso* v. *McKie Lighter Co.*, 79 F.Supp. 641 (D. Mass. 1948); *French* v. *Rishell*, 40 Cal. 2d 477, 254 P.2d 26 (1953); *Hannah* v. *Oklahoma State Highway Comm'n*, 172 Okla. 221, 45 P.2d 53 (1935); *Doca* v. *Federal Stevedoring Co.*, 116 N.Y.S. 2d 25 (1952), *aff'd*, 305 N.I. 648, 112 N.E.2d 424 (1953).

In summary, we hold that the deputy commissioner should not have entertained the second claim because it was barred by res judicata.

The judgment of the district court is reversed.

---

[8] 2 DAVIS, ADMINISTRATIVE LAW 559 (1958).

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter coming on to be determined before the Court, without jury, and upon cross-motions for summary judgment by the plaintiffs and the defendant, and the Court having considered the pleadings on file, briefs, and the transcript of proceedings before the defendant, Deputy Commissioner of Labor, and being fully advised in the premises makes the following:

FINDINGS OF FACT.

1. This action is an appeal by the Chicago Grain Trimmers Association, Inc., and its insurance carrier, New Amsterdam Casualty Company, seeking reversal of an award of compensation benefits made by the defendant, Deputy Commissioner, R. C. Enos, to Agnes M. Banks.

2. This Court adopts as its findings of fact the statements of facts contained in the compensation order of the defendant, Deputy Commissioner, as more fully set forth in the entire record of proceedings before the Deputy Commissioner;

Wherefore, upon the foregoing facts this Court makes the following:

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the parties and the subject matter, pursuant to the Longshoremen's and Harbor Workers' Compensation Act, as amended, 44 Stat. 1424, as amended.

2. There is no genuine issue of material fact presented herein, and this action may properly be determined upon the cross-motions for summary judgment filed by the plaintiffs and the defendant.

3. There is substantial evidence in the transcript of administrative proceedings which supports the findings of fact of the defendant, Deputy Commissioner, and the award based thereupon; and the decision and award of the defendant, Deputy Commissioner, was in accordance with law and is therefore final and conclusive; this Court must therefore grant the defendant's motion for summary judgment and deny the plaintiff's motion for summary judgment, affirm the decision and award of the defendant, Deputy Commissioner of Labor, and dismiss the Complaint.

Enter: /s/ James B. Parsons
Judge

Dated: June 2, 1965.

ORDER ENTERED JUNE 2, 1965.

It is ordered and adjudged that, the defendant's motion for summary judgment is allowed; the plaintiff's motion for summary judgment is denied; the compensation order of the Deputy Commissioner is affirmed, and the action dismissed on the merits.

Enter: /s/ James B. Parsons

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., and NEW AMSTERDAM CASUALTY COMPANY,
Plaintiffs,
vs.
R. C. ENOS, Deputy Commissioner,
Defendant.
No. 64 C 306

ORDER

On motion of Agnes M. Banks, widow of John J. Banks, Deceased, and representative of James M. Banks, Janice M. Banks and Catherine M. Banks, minor children of John J. Banks, Deceased, for leave of Court to intervene as additional party defendant so that she may be able to perfect an appeal for filing a Writ of Certiorari to the United States Supreme Court in the above entitled cause, due notice having been given the parties hereto, and the Court being advised of the premises,

It Is Hereby Ordered:

That the motion is denied on the ground that the Court has no jurisdiction at this time to entertain said motion.

Enter: /s/ James B. Parsons
Judge

Director, Liebenson & Raszus
Attorneys for Claimant
77 W. Washington Street
Chicago, Illinois 60602
RAndolph 6-9242

SUPREME COURT, U.S.

APR 3 1967

JOHN F. DAVIS, CLERK

No. ~~1119~~ 59

In the

Supreme Court of the United States

OCTOBER TERM, 1966 7

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents,

vs.

R. C. ENOS, Deputy Commissioner,

and

AGNES M. BANKS, widow of JOHN J. BANKS, deceased, and representative of JAMES M. BANKS, JANICE BANKS, AND CATHERINE M. BANKS, minor children of JOHN J. BANKS, deceased,
Petitioner.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

KLOHR, BRAUN, LYNCH & SMITH
39 South La Salle Street
Chicago, Illinois 60603
Attorneys for Respondents

THOMAS P. SMITH
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

List of Authorities Cited.

Cases.

	PAGE
American Mutual Liability Co. v. Lowe, 85 F.2d 625	8
Candado Stevedoring Co. v. Willard, 185 F.2d 232	7
Flamm v. Hughes, 329 F.2d 378, 380 (2d Cir. 1964)	5
International U., United A.A. and A.I.W. v. Scofield, 382 U.S. 205, 86 S.Ct. 373 (1965)	2
Marlin v. Cardillo, 95 F.2d 112 (C.A.D. 1938)	10
Seaboard Marine Repair Co. v. Cardillo, 166 F.2d 431	8

Texts.

Larson's Workman's Compensation Law, Vol. 2, 330, 333	6

Statutes.

Longshoremen's and Harbor Workers' Compensation Act,	
Sec. 921 (Title 33 U.S.C., Sec. 921)	3, 4
Sec. 922 (Title 33 U.S.C., Sec. 922)	4
Sec. 33(g) (Title 33 U.S.C., Sec. 933(g))	9
U. S. Judicial Code	
Sec. 1254(1) (Title 28 U.S.C. 1254(1))	1, 2, 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1119

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., AND NEW AMSTERDAM CASUALTY COMPANY,

Respondents,

vs.

R. C. ENOS, Deputy Commissioner,

and

AGNES M. BANKS, widow of JOHN J. BANKS, deceased, and representative of JAMES M. BANKS, JANICE BANKS, AND CATHERINE M. BANKS, minor children of JOHN J. BANKS, deceased,

Petitioner.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

I.

THE PETITIONER HEREIN IS NOT A PERSON AUTHORIZED BY LAW TO PETITION FOR A WRIT OF CERTIORARI.

The petitioner suggests that the jurisdiction of this court is invoked pursuant to Title 28 U.S.C., §1254(1). The section relied on clearly provides that a petition for Writ of Certiorari may be filed only by a party to the proceedings in the Court of Appeals. The petitioner

herein was not a party in the Court of Appeals. The pertinent portion of Section 1254(1) is as follows:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court * * *" (1) by Writ of Certiorari granted upon the petition of any *party* to civil * * * case, before or after rendition of judgment or decree." (Emphasis ours) (28 U.S.C., §1254(1))

Agnes Banks was not a *party* to the cause in the Court of Appeals and, therefore, by virtue of the provisions of Title 28 U.S.C., §1254(1), the petition for Writ of Certiorari filed herein is unauthorized.

The cited case of *International U., United A.A. and A.W.* v. *Scofield,* 382 U.S. 205, 86 S. Ct. 373 (1965) does not authorize the filing of a petition to intervene for the first time in the Supreme Court of the United States. In that case the petition to intervene was presented to the Court of Appeals and was denied, while the case was pending in the Court of Appeals. Under those circumstances this court permitted the parties so denied to seek a petition for Writ of Certiorari and after finding that the intervention petition was improperly denied, did direct that the party could properly seek a petition for Writ of Certiorari, it having properly and timely petitioned to intervene in the Court of Appeals.

In this case, no such timely intervention was sought by the petitioner. When the Deputy Commissioner's ruling was appealed to the Federal District Court, Agnes Banks, through her attorney, was served with a copy of the Complaint. No attempt was made to intervene at that time. After the ruling in the Federal District Court on June 2, 1965, a notice of appeal was filed advising that an appeal would be sought to the United States Court of

Appeals for the Seventh Circuit. A copy of this notice of appeal was served on Harold A. Liebenson, attorney for Agnes Banks, on July 26, 1965. (A. 105) Again, no attempt was made to intervene by the petitioner nor was any effort made to intervene from the time of the decision reversing the award on July 13, 1966 to the denial of the petition for rehearing on October 6, 1966. The first request to intervene was not made until after the initial 90 day period to seek a Writ of Certiorari had been extended by Justice Tom C. Clark in response to a telegraphic request by attorney Harold Liebenson. That telegraphic motion to extent time was also improper and unauthorized as it was not made by a party to the cause in the Court of Appeals.

The only parties to the cause before the District Court and in the United States Court of Appeals were Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Company, Plaintiffs-Appellants, and R. C. Enos, Deputy Commissioner, Defendant-Appellee.

By virtue of the provisions of Title 28 U.S.C., §1254(1) the petitioner herein is not authorized to request the issuance of a Writ of Certiorari nor was petitioner a person authorized to request the extension of time.

II.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH OTHER DECISIONS NOR DOES IT CONFLICT WITH ANY SECTION OR PURPOSE OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Section 921 of the Longshoremen's and Harbor Workers' Compensation Act provides for judicial review of a compensation order by the commencement of proceedings in

the Federal District Court for the district in which the injury occurred within 30 days after the entry of the order. (Title 33 U.S.C. §921)

Section 922 of the Longshoremen's and Harbor Workers' Compensation Act provides for the modification of a compensation order on the application of a party on the ground of a change in condition or because of a mistake in a determination of fact by the Commissioner and request for such modification may be filed within 1 year from the date of the order or 1 year from the date of last payment. (Title 33 U.S.C. §922)

The petition for Writ of Certiorari herein confuses the 30 day period in which the basic issues of liability may be reviewed by appeal through the Federal Court system with the 1 year period in which a request for modification may be filed with the Deputy Commissioner. The petition further confuses the nature of the issues which may be raised only on appeal to the Federal District Court with the nature of the question which may be determined on a petition for modification.

The opinion of the Court of Appeals herein clearly demonstrates that the principle of res judicata must be applied to administrative decisions where the second proceeding involves the same claim or the same transaction and applies to an adjudication of past facts. The decision of the Court of Appeals does not impair the purpose of a modification hearing under Section 922.

If the contention of petitioners herein were accepted, there would be no need for judicial review as provided in Section 921 as any party could continually relitigate the entire case by filing a Section 922 petition within 1 year. That procedure quite obviously would be destructive of

the entire administrative process and would be most harmful to the employee who could be subjected to constant litigation challenging his right to compensation even after an award had been entered. An employee under petitioner's interpretation of Section 922 could be compelled to re-establish his right to compensation whenever he found it necessary to petition for additional compensation or medical benefits upon a change of condition.

The initial briefs in the Court of Appeals did not suggest that the second claim of Agnes Banks was intended or could be a Section 922 petition. The opinion however in its completeness pointed out in a footnote that the appellee's brief conceded that the second claim was not filed within the 1 year limitation of Section 922. That quotation of an erroneous comment in appellee's brief had no affect on the court's decision as the opinion in no way rested on any element of time. The petition herein nonetheless belabors that footnote comment and ignores the court's statement that Section 922 is inapplicable because the claim did not dispute the findings of fact made by the Deputy Commissioner. The court cited *Flamm* v. *Hughes*, 329 F. 2d 378, 380 (2d Cir. 1964) as authority for its belief that a section 922 petition for modification because of mistake must dispute the findings of the first hearing.

The petition here at Page 15 erroneously attacks *Flamm* v. *Hughes* as authority with the statement that it involved a constitutional issue only. A reading of the entire case shows that after the constitutional issue was decided, the court in the *Flamm* case turned to the question of the validity of the claim as a claim under Section 922. The court held that it did not qualify as a Section 922 claim for the reason that although so labeled, it did not

dispute findings of fact originally made. Here also the second claim did not attack the initial findings but, by its allegations and the conduct of the petitioner and her counsel, it was considered a new case. The Deputy Commissioner stated the second hearing would proceed because it was a new claim under a new date. (A. 21) No one during all of the proceedings before the Deputy Commissioner made any suggestion that a mistake had been made or that original findings should be re-examined.

The entire concept was to forget the first hearing and start over. To start over is not the purpose of the reopening provision of the Longshoremen's and Harbor Workers' Compensation Act or of any other compensation act. The purpose of this type of provision is described in Larson's Workman's Compensation Law, Vol. 2 at Page 330:

> "This provision is a recognition of the obvious fact that, no matter how competent a Commissioner's diagnosis of claimant's condition and earning prospects at the time of the hearing may be, that condition may later change markedly for the worse, or may improve, or may even clear up altogether. Under the typical award in the form of periodic payments during a specified maximum period or during disability, the objectives of the legislation are best accomplished if the Commission can increase, decrease, revive or terminate payments to correspond to claimant's changed condition. * * *"

The author further stated in §81.32 at P. 333 when discussing the issues that are relevant in reopening that:

> "In a reopening proceeding, the issue before the board is sharply restricted to the question of extent of improvement or worsening of the injury on which

> the original award was based. If the original award held that there was no connection between the accident and the claimant's permanent disability, there is nothing to reopen, and claimant cannot retry the issue of work-connection through the device of a reopening petition. Conversely, when the employee reopens to show increased disability, the insurance carrier cannot raise the basic issue of liability. * * *"

The petition herein repeatedly suggests that Section 922, the reopening provision of the Longshoremen's and Harbor Workers' Compensation Act, was enacted because of the concern of Congress of the application of the doctrine of res judicata. We know of no evidence or authority for that assertion and none was cited in the petition. The purpose of the section is as described by Dean Larson.

The holding of the Court of Appeals herein requires only that an employee must assert every basis for liability in his original claim and that the employer must assert each defense to liability in the first claim and that alternative theories of liability or alternative defenses cannot be withheld to be raised in subsequent proceedings for modification. The 3 cases cited in the petition on Page 8 are not in conflict with this holding.

In *Candado Stevedoring Co.* v. *Willard,* 185 F. 2d 232 the longshoreman claimed additional compensation because of continuing disability after an initial finding that the accident arose out of and in the course of the employment and after an initial award. The opinion here is in no way in conflict with the case as the opinion here does not suggest that the nature of an employee's disability cannot be re-evaluated upon a showing that it has increased, been extended or even diminished.

In the second case cited, *American Mutual Liability Co.* v. *Lowe,* 85 F. 2d 625, the employee also asked for a re-evaluation upon new evidence that the extent of his disability had continued for a longer period than initially contemplated. The opinion herein in no way suggests that that type of re-evaluation or request for modification is not permissable.

In *Seaboard Marine Repair Co.* v. *Cardillo,* 166 F. 2d 431, the second claim was clearly captioned a Section 922 petition in that it requested a review and modification of the first order and specified the evidence in the first case that the Deputy Commissioner had overlooked. After reviewing that earlier testimony and hearing additional testimony, the order was modified regarding the question of notice to the employer. Such is not the case here as there was no request in this case to review earlier testimony. Every effort was made to prevent reconsideration of testimony in the first case such as that of the claimant that her husband had complained of headaches, light headedness, had been listless and despondent and could not hold a good conversation for days prior to the alleged rope incident of January 30, 1961 (A-78, 80)

The holding in this case by the Court of Appeals is not in conflict with the cases cited but is a ruling absolutely essential to an orderly administration of the Act. If the contention of petitioners herein is accepted, then in each of the cases cited where the petitioner sought additional compensation for a continuing disability, he could have been forced by the employer to first re-establish his basic entitlement. Such is obviously not the intent of Section 922.

It is, therefore, the nature of the claim presented, not the time it was filed or the name it was given that makes

Section 922 inapplicable. The arguments and citations as to when a Section 922 must be filed and how soon it must be acted upon are irelevant upon a determination that the second claim cannot be considered in the nature of a 922 petition.

III.

THE RESULT REACHED IN THE COURT OF APPEALS DECISION IS REQUIRED BY TWO INDEPENDENT REASONS IN ADDITION TO THE APPLICATION OF THE DOCTRINE OF RES JUDICATA.

A. A $19,000 Settlement Without The Written Approval Of The Employer Constitutes An Absolute Bar To A Subsequent Claim For Compensation.

Section 933(g) of the Longshoremen's and Harbor Workers' Compensation Act provides for the rights of the employer and the employee when an action is brought by the employee or his representative against an allegedly negligent third party. The pertinent portions of that section are as follows:

> "(g)If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall become liable for compensation as determined in subdivision (f) of this section *only if such compromise is made with his written approval.*" (73 Stat. 391, Title 33 U.S.C. Sec. 933 (g) (Emphasis ours)

Agnes Banks brought a negligence action against the Norris Grain Company in the District Court for Northern Illinois. A judgment of $30,000 was entered and thereafter when the trial judge indicated he would grant a new trial, Agnes Banks compromised that third party action for a total sum of $19,000. The settlement of the

case for $19,000 was done without the written approval of the employer. It, therefore, clearly violated the provisions of Section 933(g). Agnes Banks in this case settled the case without the written consent of the employer and, therefore, has forfeited any right to seek additional compensation from the employer. It is so stated in *Marlin* v. *Cardillo,* 95 F. 2d 112 (C.A.D. 1938) at Page 114:

> "* * *The thing petitioner did is the thing which* paragraph (g) of section 33 says *cannot be done except by surrendering all further claim against the employer.* The language used by Congress is so definite and unmistakable in its purpose that to read into it, as petitioner would have us, the proviso that it is to apply only if the carrier is damaged by the compromise, would be a usurpation of legislative power, and in this view it is not for us to inquire whether there is a good reason or not for desiring the rule to be as petitioner insists, *for we are impelled by the plain terms of the Act to apply it as it is written."* (Emphasis ours)

B. There Was No Competent Evidence To Support A Causal Relationship Between The Fatal Fall At Home And Decedent's Work.

In the second hearing before the Deputy Commissioner, it was agreed as in the first hearing that the injuries sustained at home on January 30 caused the death of John Banks. The only proof offered to connect that fall at home with the alleged rope incident at work was Dr. I. Joshua Spiegel. He first stated that there might or could be a causal relationship between the rope incident and the fall at home. However, the hypothetical question propounded to him was not clear and when the Deputy Commissioner clarified the facts of the hypothetical question, the witness reversed his opinion and stated that it was impossible. The doctor's testimony in this regard is as follows:

"Deputy Commissioner Enos: The testimony is that this gentleman came to the top of the stairs and he pitched forward, and went down the stairs, not touching the stairs with any part of his body; that he fell, struck his head on the concrete floor below. I would like to know whether or not from a medical standpoint that sort of thing is practical?

The Witness: It's impractical. It's impossible not to touch the steps, because the hypothetical describes two walls, so he couldn't fall down the stairwell. He had to fall forward down the continuity of steps.

Q. There was a set of 11 steps there.

A. He would have to fall forward.

Q. The testimony is that he pitched forward down those steps and no part of his body touched those steps as he went down.

A. *I do not see how that is possible, unless as I told Mr. Braun, he took a running start.* To clear the steps would be if the step was 10 inches, 110 inches, it would almost be 10 feet.

Q. Do you know of any medical—anything in the medical literature that would account for anything like that?

A. No, sir. He couldn't clear 10 feet. It is approximately 10 feet. I just figured it out, 11 steps, and if he is falling down like this (indicating), if he is falling even just like this (indicating), as he fell *he has to fall on the steps.* Ten feet is a respectable broad jump. Here is 10 feet, from here (indicating) to here.

Q. You could not explain that from a medical standpoint how a man could pitch forward and clear the entire steps, land on his—

A. There are some rare diseases, like tetanus, certain poisons, where the muscles go into tremendous contractions, and in fact that is what kills the patient.

Q. You did testify, did you not, Doctor, that in your opinion the cause of this man falling was loss of consciousness by reason of an acute subdural hematoma?

A. I did, yes, sir.
Q. What would be the natural reaction?
A. Just a fall—
Q. Would he have a tendency to slump?
A. He could slump.
Q. And tumble down the stairs?
A. Yes, he could.
Q. I presume if he was unconscious when he started, that that would account for the fact that he did not use his arms to protect himself in any way going down?
A. That is a proper assumption. He could fall straight. He wouldn't of necessity have to slump down into a huddle. He could fall straight down and continue falling, *but he would have to hit the steps.*" (A 54, 55) (Emphasis ours)

This testimony that the fall as described was impossible under the circumstances leaves the record without proof, that there could be a relationship between the work and the decedent's fatal fall in his home. The award being without substantial foundation in factual proof, the Court of Appeals would be required to reverse the award on that ground if it had not done so on the finding that the award was barred by the doctrine of res judicata.

Therefore, even if the court were persuaded to grant a Writ of Certiorari by the plea of the petition that the case involved a widow and minor children, it can be seen that the same result would obtain upon a consideration of the 2 separate and complete defenses presented to the Court of Appeals but not decided because of the determination that the doctrine of res judicata is applicable.

The sympathy argument of the petition herein is also far less compelling when it is noted that Agnes Banks was represented by counsel from the very outset. John Banks

died on February 12, 1961 12 days after he sustained fatal injuries in his own home. With advice of counsel, Agnes Banks immediately filed the first claim on February 20, 1961. (A. 77) During the second trial, Agnes Banks stated that she had been told about the rope falling incident in February, 1961, prior to the first trial. (A. 36) Also, prior to that trial, she had reviewed the entire matter in great detail with her attorney. She had also gone over it with Lawrence Banks, brother of her husband and president of the Grain Trimmers Association, and with her brother, Frank Costello, an employee of the Grain Trimmers Association. (A. 36, 37) Agnes Banks, Lawrence Banks and Frank Costello each testified in the first trial on behalf of the claimants and each failed to mention the alleged January 30 rope incident.

This conscious withholding of an alleged alternative theory is the precise evil which must be eliminated by an application of the doctrine of res judicata.

CONCLUSION.

The respondents respectfully submit that the petitions herein be denied for the reason that the petitioner is not authorized by law to request an extension of time or to request that a Writ of Certiorari be issued and for the further reason that there is no basis or authority to justify an initial request for intervention in this Court.

It is further respectfully submitted that the petition for Writ of Certiorari be denied for the reason that the holding of the court below is essential to insure the rights of employers and employees in compensation proceedings and to insure orderly administration of the Longshore-

men's and Harbor Workers' Compensation Act and for the reason that the decision below is not contrary to any decision of this Court and is not in conflict with decisions of other Courts of Appeal.

Respectfully submitted,

KLOHR, BRAUN, LYNCH & SMITH
39 South La Salle Street
Chicago, Illinois 60603
Attorneys for Respondents

THOMAS P. SMITH
Of Counsel

SUPREME COURT, U. S.
No. 57
MAY 16 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

AGNES M. BANKS, ETC., PETITIONER

v.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., ET AL.

ON PETITIONS FOR LEAVE TO INTERVENE AND FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE DEPUTY COMMISSIONER (DEPARTMENT OF LABOR)

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1119

AGNES M. BANKS, ETC., PETITIONER

v.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., ET AL.

ON PETITIONS FOR LEAVE TO INTERVENE AND FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE DEPUTY COMMISSIONER (DEPARTMENT OF LABOR)

On April 17, 1967, the Court invited the views of the Solicitor General in this case, which is before the Court on a petition for a writ of certiorari filed by the representatives of a deceased longshoreman.

Petitioner filed a claim with the Department of Labor under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901-950, alleging that her decedent had died as the result of a work-connected accident occurring on January 26, 1961.

The Department's deputy commissioner denied the claim. Later, petitioner filed a new claim, this time alleging an accident on January 30. The deputy commissioner sustained the second claim and awarded compensation. The district court upheld the award. The court of appeals reversed, holding that the deputy commissioner's ruling on the first claim was *res judicata*.

Petitioner was not a party in the courts below but the award was defended by the United States Attorney as provided in 33 U.S.C. 921a. When the government decided not to file a petition for a writ of certiorari (a decision reflecting doubt that the case had sufficient general importance to warrant review by this Court), petitioner filed her own petition for certiorari. At the same time, she sought leave to intervene in the district court, which denied her motion. She filed no notice of appeal from the district court's order, although her counsel did consult orally with the clerk and the chief judge of the court of appeals; the latter, according to counsel, informed him that an appeal would be futile because the court of appeals' mandate had already gone down and the court had lost jurisdiction of the case.

1. There is a threshold question whether this Court has jurisdiction to grant a writ of certiorari as prayed for in the petition. While it is true that "any party" may file a petition (28 U.S.C. 1254(1)), petitioner was not formally made a party in the proceedings below. She did not seek leave to intervene until after the judgment of the court of appeals was rendered, and the motion to intervene

which she then filed was denied by the district court. On the other hand, the procedure whereby the award is defended by the government in the courts is not designed to vindicate any independent governmental interest, but, rather, to remove the burdens of litigation from the shoulders of the compensation claimants, who are rarely individuals of means. In a practical sense, therefore, the claimant is the real party in interest in the judicial proceedings even if not formally named, and it would not appear unreasonable to deem petitioner a party below for purposes of entitlement to file a petition for a writ of certiorari.[1]

2. Section 22 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 922, provides that

> upon the application of any party in interest, * * * because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to * * * one year after the rejection of a claim, review a compensation case * * * and * * * issue a new compensation order * * *.

---

[1] Alternatively, if petitioner could be said to have perfected an appeal to the court of appeals from the order of the district court denying intervention, the petition could be viewed as seeking review not only of the court of appeals' judgment but also of the refusal to permit her to intervene. In that event, if the Court agreed that intervention was wrongly denied (and we can think of no sound reason for denying intervention to petitioner), it would be free also to consider the merits of the judgment below. *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Co.*, 386 U.S. 129.

While neither petitioner nor the deputy commissioner specifically invoked Section 22 in the administrative proceedings, we believe that there is substantial basis for arguing that this provision precluded a finding of *res judicata* in the circumstances of this case. Petitioner's second claim was filed within "one year after the rejection of" her first claim for compensation benefits,[2] and constituted, in effect, a challenge to the previous finding of the deputy commissioner that the decedent's death was not work-connected.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

---

[2] See *Candado Stevedoring Corp.* v. *Willard*, 185 F. 2d 232, 233, where the Second Circuit stated: "That the applicant called the paper he filed a 'claim for compensation' instead of an 'application' for review is of no moment."

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 262705 868

SUPREME COURT, U. S.

No. 38

In the Supreme Court of the United States

OCTOBER TERM, 1947

AGNES M. SAHR, ETC., PETITIONER

v.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., ET AL.

ON PETITIONS FOR LEAVE TO INTERVENE AND FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE DEPUTY COMMISSIONER (DEPARTMENT OF LABOR)

PHILLIP B. MARSHALL,
Solicitor General,
Department of Labor,
Washington, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 59

AGNES M. BANKS, ETC., PETITIONER

v.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., ET AL.

ON PETITIONS FOR LEAVE TO INTERVENE AND FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE DEPUTY COMMISSIONER (DEPARTMENT OF LABOR)

On June 5, 1967, the Court invited the Solicitor General to file a supplemental brief in this case, addressed to the bearing of 33 U.S.C. 933(g).

Section 33 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 933, provides that an individual entitled to compensation under the Act who thinks that someone besides his employer is liable in damages to him may bring suit against such third person, and may thereafter obtain a compensa-

tion award under the Act against his employer to the extent that the allowable benefits exceed the third-party recovery. If, however, he merely accepts the compensation award without instituting suit against the third person, all his rights against the third person are assigned to the employer. Furthermore, Section 33(g) of the Act, 33 U.S.C. 933(g), provides that:

> If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation * * * only if such compromise is made with his written approval.

Petitioner's husband, an employee of the respondent Chicago Grain Trimmers Association, Inc., suffered injuries during his employment that resulted in his death. Petitioner instituted a wrongful death action against the Norris Grain Company, claiming that it was responsible for the injuries. After a jury returned a $30,000 verdict in her favor, Norris Grain Company moved the district court to set aside the verdict or to grant a new trial. The district judge ordered that the motion for a new trial stand granted unless petitioner entered in the record a remittitur in the sum of $11,000. Without seeking or obtaining the consent of the Chicago Grain Trimmers Association or its insurance carrier, petitioner accepted the remittitur. Respondent asserts that such acceptance was a "compromise" of petitioner's claim

within the meaning of Section 33(g) which, not having received the written approval of the employer, resulted in the forfeiture of any rights petitioner and her children might otherwise have to compensation. The Deputy Commissioner did not rule expressly on this contention, although he necessarily rejected it since he awarded compensation, deducting from the award petitioner's recovery against the third party. The district court upheld the Deputy Commissioner's award. The court of appeals reversed on the ground that *res judicata* precluded the award of compensation benefits. It did not reach the question whether the award was also barred by Section 33(g). We think it was not.

By its express terms, Section 33(g) is operative only if there is a (1) compromise (2) between an employee entitled to benefits (or his representative) and a third party liable to that employee. Neither of these requirements is satisfied by an order of remittitur. Such an order is an adjudication that damages in excess of a particular amount are not recoverable. See *Arkansas Cattle Co.* v. *Mann*, 130 U.S. 69, 73-74; *Northern Pacific R.R. Co.* v. *Herbert*, 116 U.S. 642, 646-647; 6A Moore, *Federal Practice*, ¶ 59.05[3]. It involves no agreement based on mutual concessions; and certainly it is not the product of agreement between the parties to the litigation. A compromise, on the other hand, does involve an agreement between the parties, and mutual concessions by the parties are an essential element of that agreement. See, *e.g.*, *Lewis* v. *United States*, 17 F. Supp. 543, 546 (D.

Col.), affirmed *sub nom. Sanders* v. *Commissioner of Internal Revenue*, 101 F. 2d 407 (C.A. 10); *Ross Packing Co.* v. *United States*, 42 F. Supp. 932, 934 (E.D. Wash.); *In re Lovel Bldg. Co.*, 116 F. Supp. 383, 385 (D. N.J.).

This distinction has been recognized by the New York Court of Appeals in construing the New York employees' compensation act, upon which the Longshoremen's and Harbor Workers' Compensation Act was based.[1] Confronted with the same question—whether an employee's remittitur without the employer's consent constituted a compromise—the New York court held that a remittitur of $3,000 dollars of a $5,000 judgment did not constitute a compromise. It stated:

> The judgment for $2,000 was rendered in accordance with immemorial common law practice after a full and constitutional jury trial. The optional order of remittitur and the stipulation of plaintiff pursuant thereto did not constitute a waiver of a jury trial. They were integral incidents of a jury trial actually had which eventuated by constitutional practice in a judgment actually entered * * *. *We think the compromise provision of Section 29 of the Workmen's Compensation Law was not intended to apply to the procedure here in question. Plaintiff's stipulation consenting to take that portion of the verdict judicially determined as being not excessive, does*

[1] See *Lawson* v. *Suwannee S.S. Co.*, 336 U.S. 198, 205; H. Rep. No. 1190, 69th Cong., 1st Sess., p. 2 ("The bill follows in the main the New York State compensation law, which is considered one of the best").

not fall within any recognized meaning of the word "compromise." [*Gallagher* v. *Carol Construction Co.*, 272 N.Y. 127, 129, 5 N.E. 2d 63 (1936); emphasis added.]

This ruling is in accord with sound policy and legislative purpose. The purpose of Section 33(g) is to make certain that an employee's independent management of his lawsuit against the third person does not operate to the detriment of his employer. See *Bell* v. *O'Hearne*, 284 F. 2d 777, 780 (C.A. 4). The provision thus presumes that a compromise not consented to by the employer may be prejudicial to him and provides for the forfeiture of compensation benefits to void the prejudicial effect. The danger of a compromised settlement to the employer—that it might understate the third party's liability and so increase the employer's—is not presented by a remittitur, which is a judicial determination, in an adversary proceeding, of the maximum recoverable damages. See *Bell* v. *O'Hearne*, *supra*, 284 F. 2d at 780; cf. *Chapman* v. *Hoage*, 296 U.S. 526, 532; *Weyerhaeuser Timber Co.* v. *Marshal*, 102 F. 2d 78, 81 (C.A. 9). To be sure, where the employee accepts the remittitur, he foregoes the possibility that at a new trial additional evidence might be presented that would result in an award of greater damages which the courts would allow to stand. Such a possibility, however, is "too remote and fanciful to merit consideration." *Bell* v. *O'Hearne*, *supra*, 284 F. 2d at 781. Conduct of an employee toward a third party which is not clearly a compromise within the normally recognized meaning

of that word, even though unconsented to by the employer, will not work a forfeiture of compensation benefits unless the employer is substantially prejudiced. See *Chapman* v. *Hoage*, *supra*, 296 U.S. at 532; *Bell* v. *O'Hearne*, *supra*, 284 F. 2d 780-781; *Weyerhaeuser Timber Co.* v. *Marshall*, *supra*, 102 F. 2d at 81; *Candado Stevedoring Corp.* v. *Lowe*, 85 F. 2d 119, 120-121 (C.A. 2), certiorari denied, 299 U.S. 588. There has been no such showing of substantial prejudice by the employer-respondent.

In sum, the language and purpose of Section 33(g) support the view that a remittitur is not a compromise. Such an interpretation results in no significant prejudice to the employer and is the only reading consistent with this Court's admonition that the Longshoremen's Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris* v. *Eikel*, 346 U.S. 328, 333.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JULY 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 268234 1021

SUPREME COURT U. S.

No. 59

Office-Supreme Court, U.S.
FILED
NOV 22 1967
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1967

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents,

vs.

R. C. ENOS, Deputy Commissioner,

and

AGNES M. BANKS, widow of JOHN J. BANKS, deceased, and representative of JAMES M. BANKS, JANICE BANKS, and CATHERINE M. BANKS, minor children of JOHN J. BANKS, deceased,
Petitioner.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER AGNES M. BANKS

HAROLD A. LIEBENSON
77 W. Washington Street
Chicago, Illinois 60602
312-726-9242
Attorney for Petitioner Banks

EDWARD G. RASZUS
HARRY J. DIRECTOR
MICHAEL J. WEININGER
77 W. Washington Street
Chicago, Illinois 60602
312-726-9242
Of Counsel

INDEX

PAGE

Opinion below ..... (A. 109)

Jurisdiction 2

Question presented 2

Statutes involved 3

Statement of the Case 4

Argument:

A. With respect to the question of whether or not the doctrine of res judicata is applicable.

1. The doctrine is not applicable because of 33 U.S.C. 922 8

2. The doctrine is not applicable because of the facts of the case 14

B. Court ordered remittitur does not bar a claim under 33 U.S.C. 933 (g) 22

C. There was competent evidence to support a causal relationship between the occurrence and death of John Banks 27

Conclusion 29

CITATIONS.

Cases:

American Mutual Liability Ins. Co. of Boston v. Lowe, 85 F. 2d 625 (C.A. 5 1936) 10

Arkansas Cattle Co. v. Mann, 130 U.S. 69 (1888) 24

Ash Sheep Co. v. U. S., 252 U.S. 159 (1919) 19

Bell v. O'Hearne, 284 F. 2d 777 (C.A. 4 1960) 25, 26

Calbeck v. A. D. Suderman Stevedoring Co., 290 F. 2d 308 (C.A. 5 1961) 14

PAGE

Candado Stevedoring Corp. v. Lowe, 85 F. 2d 119 (C.A. 2 1960) 26

Candado Stevedoring Corp. v. Willard, 185 F. 2d 232 (C.A. 2 1950) 10

Cardillo v. Liberty Mutual Ins. Co., 340 U.S. 469 (1950) 27

Chapman v. Huage, 296 U.S. 526 (1935) 26

Commissioner v. Sunnen, 333 U.S. 591 (1947) 17

Cromwell v. County of Sac., 94 U.S. 351 (1876) 18

Eschbach v. Brown, D.C. Ill. 1949, 84 F. Supp. 825 Rev. other grounds 181 F. 2d 860 16

Flamm v. Hughes, 329 F. 2d 378 (C.A. 2 1964) 12

Gallagher v. Carol Const. Co., 272 N.Y. 127 (1936) .. 25

In re Lovel Bldg. Co., 116 F. Supp. 383 (D.C. N.J.) (1953) 24

Jarka Corp. v. Hughes, 299 F. 2d 534 (C.A. 2 1962) .. 14

Lewis v. U. S., 17 F. Supp. 543 (D.C. Col. 1936), Affmd. Sub. Nom. Sanders v. Commissioner of Internal Rev. 101 F. 2d 407 (C.A. 10) 24

Mercoid Corp. v. Mid Continent Co., 320 U.S. 661 (1943) 18

Northern Pacific R. R. Co. v. Herbert, 116 U.S. 642 (1885) 24

O'Keefe v. Smith Associates, 380 U.S. 359 (1965) 27

O'Leary v. Brown, 340 U.S. 504 (1950) 27

Reynolds v. Stockton, 140 U.S. 254 (1890) 19

Ross Packing Co. v. U. S., 42 F. Supp. 932 (E.D. Wash. 1942) 24

PAGE

Russell v. Place, 94 U.S. 606 (1876) 18

Seaboard Marine Repair Co. v. Cardillo, 166 F. 2d 431 (C.A. 2 1948) 9, 10

Sherrer v. Sherrer, 334 U.S. 343 (1947) 19

Southern Pac. Ry. v. U. S., 168 U.S. 1 (1897) 18

Stansfield v. Lykes Bros. S.S. Co., 124 F. 2d 999 (C.A. 5 1942) 14, 20

Tudman v. American Ship Bldg. Co., 170 F. 2d 842 (C.A. 7 1948) 14

Urbain v. Knapp Bros. Mfg. Co., 217 F. 2d 810 (C.A. 6 1954) 9

Vandemia v. Christaldi, 221 F. 2d 103 (C.A. D.C. 1955) 9

Voris v. Eikel, 346 U.S. 328 (1953) 12, 26

Weyerhaeuser Timber Co. v. Marshall, 102 F. 2d 78 (C.A. 9 1939) 26

STATUTES.

Longshoremen's and Harbor Workers' Compensation Act

Sec. 22 (33 U.S.C. 922) 3

Sec. 21 A (33 U.S.C. 921a) 3

Sec. 33 (g) 33 U.S.C. 33g) 3, 23

Sec. 30 a, b, f, (33 U.S.C. 30 (a) (b) (f) 15

RESTATEMENT.

Judgments, Sec. 62 (b) 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 59

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents,

vs.

R. C. ENOS, Deputy Commissioner,

and

AGNES M. BANKS, widow of JOHN J. BANKS, deceased, and representative of JAMES M. BANKS, JANICE BANKS, and CATHERINE M. BANKS, minor children of JOHN J. BANKS, deceased,
Petitioner.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER AGNES M. BANKS

A. REFERENCE TO REPORTS OF OPINION

The opinion of the Court of Appeals is reported at 369 F. 2d 344.

B. STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was entered on July 13, 1966. The petition for rehearing was denied by that court on October 6, 1966. A motion to extend time for filing a writ of certiorari to March 5, 1967, was allowed by Justice Tom C. Clark on January 4, 1967. The Petition for a Writ of Certiorari was filed on March 4, 1967, and was granted on October 9, 1967. Jurisdiction of this Court rests on Title 28 U.S.C.A. 1254 (1).

C. QUESTIONS PRESENTED FOR REVIEW

1. Where under title 33 U.S.C. 922, the Deputy Commissioner in a case under the Longshoremen's and Harbor Workers' Compensation Act, has the power to issue a new order based on his own initiative or upon the application of any other party in interest, because of mistake in determination of facts, is it not contrary to said statute to invoke the doctrine of res judicata and deny the Deputy Commissioner that power especially where a timely petition had set forth facts of a new occurrence that caused the Harbor Worker's death and was the sole basis for the new order granting an award for the death of said Harbor Worker?

2. Is the acceptance of $19,000 after a $30,000 jury verdict pursuant to an order of remittitur entered by the trial judge in an action against alleged negligent 3rd party a compromise of that action within the meaning of the term "compromise" in the Longshoremen's and Harbor Workers' Compensation Act and thereby a bar to a claim for compensation?

D. STATUTES AND REGULATIONS INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1437, as Amended:

33 U.S.C. 921(a)

> "In any court proceedings under section 921 of this title of other provisions of this chapter, it shall be the duty of the United States attorney in the judicial district in which the case is pending to appear as attorney on behalf of the Secretary of Labor or his deputy commissioner when either is a party to the case or interested, and to represent such Secretary or deputy in any court in which such case may be carried on appeal."

33 U.S.C. 922 (Section 22 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1437, as amended) provides in pertinent part:

> "Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation."

33 U.S.C. 933 (g) of the Longshoremen's and Harbor Workers' Compensation Act 44 Stat. 1424 provides in part as follows:

> "(g) If a compromise with such third person is made by the person entitled to compensation or such

representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall become liable for compensation as determined in subdivision (f) of this section only if such compromise is made with his written approval."

E. STATEMENT OF THE CASE

Decedent, John J. Banks, was employed by the Chicago Grain Trimmers Association, Inc., as a grain trimmer since 1934, which involves the loading and unloading of grain from barges and vessels, to and from various located grain elevators, with port locations and grain elevator locations varying from day to day, depending on traffic (incoming and outgoing).

On January 30, 1961, at approximately 4:45 P.M., upon arrival at his home from work and while at head of basement steps, he suddenly fell forward, with his arms at his sides striking the concrete floor approximately 10 steps down, at no time crying out or attempting to arrest his fall and thereby being rendered unconscious without ever regaining his consciousness and expiring on February 21, 1961.

A claim was filed under the Longshoremen's and Harbor Workers' Compensation Act for compensation benefits on February 20, 1961, as number 46-71, alleging an accidental injury at work on January 26, 1961, which caused his fall on January 30, 1961. There were no eye witnesses to this occurrence and no testimony given regarding this accident except for some incomplete hearsay statements. The only possible evidence of any injury alleged to have accidentally occurred on January 26, 1961, was a little black speck on decedent's forehead (A. 8, 9). The Deputy Commissioner found that as a result of the evidence presented with relation to the

accident of January 26, 1961, that it was not established that the employee's death was the result of an injury which arose out of the course of his employment on January 26, 1961. (A. 10) This finding was made on June 8, 1961.

Subsequent to June 8, 1961 the claimant was notified that there was a witness to an accident which took place on January 30, 1961, at 2:30 P.M. (two hours prior to his fall from the top of the steps at home.) At the hearing of the first claim involving the alleged occurrence the eyewitness, Mike Miramontez, to the second occurrence was unknown to the claimant but was known to the respondent insurance company which had a statement from Mike Miramontez which told them about the occurrence of January 30, 1961, but this information was withheld by them from the Deputy Commissioner and the claimant. (A. 38) This witness was contacted and subsequent thereto another claim (46-73) was filed (within 1½ months subsequent to the rejection of the first claim) before the Longshoremen's and Harbor Workers' Commission alleging that John Banks was injured on January 30, 1961, which injury caused his death. This claim was filed on August 22, 1961. The respondent filed two forms in response to this claim. In both forms they assert the claim of res judicata because of the prior finding. (A. 101, 102) The second case was heard by the same Deputy Commissioner. After the second hearing he issued an award in favor of the claimants finding that the injury and death arose out of and in the course of his employment as a result of the accident of *January 30, 1961.* (A. 13) It is important to illustrate the salient features of each occurrence.

	Accident 1	Accident 2
Date:	January 26, 1961	January 30, 1961
Place:	Gateway Elevators (A90) 127th & Calumet (A91) Chicago, Illinois	Norris Elevators (A23) 98th & Calumet River Chicago, Illinois
Eyewitnesses:	None	Mike Miramontez (A23)
Time:	Unknown	2:00 P.M. (A23)
Type of work:	Button man (A8)	Tripper (A23)
How injured:	Allegedly struck by steel cable in forehead. (Hearsay) (A 8, 91)	Struck on top of head by rope falling 50 feet weighing about 30 pounds. (A25)
Visual injury:	Little black spot on forehead (A91)	Constant rubbing of head (A 24)

After the first trial before the Deputy Commissioner, and after a second claim was filed before the same Deputy Commissioner, but prior to the second trial of that claim, 3rd party action was brought in the Federal Court for the Northern District of Illinois by the personal representative of the Estate of John Banks against the Norris Grain Company arising out of the occurrence of January 30, 1961 which subsequently caused the death of John Banks. This action arose out of the same occurrence at 98th and Calumet River, Chicago, Illinois which was subject to the second hearing before the Deputy Commissioner with basically the same witnesses testifying in both the Federal Court action and the second hearing before the Deputy Commissioner. On May 3, 1963 a jury returned a verdict in favor of the plaintiff and against the Norris Grain Company for the wrongful death of John Banks in the sum of $30,000. The defendant Norris Grain Company in accordance with the law moved the

Court for a judgment notwithstanding the verdict or in the alternative for a new trial.

Judge Holland, who presided during the trial of the cause of action ordered that the motion for a new trial would be allowed unless the libellant within 10 days accepted a remittitur of $11,000. (A. 12) The libellant accepted the remittitur on May 17, 1963, and a judgment was entered and satisfied in the amount of $19,000. (A. 11)

Thereafter, the employer and its insurance carrier filed a motion with the Deputy Commissioner alleging that the acceptance of the court ordered remittitur was a compromise without the employer's written approval thereby barring the pending claim. (A. 21)

The second hearing before the Deputy Commissioner proceeded on August 29, 1963 on the allegation of the injuries and death sustained by John Banks on January 30, 1961. The employer asserted the two defenses: that the hearing relating to the alleged accident of January 26, 1961 was res judicata; and that the acceptance of the court ordered remittitur was a bar to this action. On January 27, 1964, findings of fact and award were entered by R. C. Enos, Deputy Commissioner. (A. 19)

An action was filed in the United States District Court to set aside and enjoin the enforcement of the award of the Deputy Commissioner. The claimants were not represented in this hearing. Cross motions for summary judgment were filed with the district court and on June 2, 1965, the district judge adopted the findings of fact and conclusions of law filed on behalf of the Deputy Commissioner. An appeal was taken to the Court of Appeals (C.A. 7), who ruled that the original hearing relating to the alleged accident of *January 26, 1961,* was res judicata as to the accident of *January 30, 1961.* (A. 109)

G. ARGUMENT

A. WITH RESPECT TO THE QUESTION OF WHETHER OR NOT THE DOCTRINE OF RES JUDICATA IS APPLICABLE.

1. The Doctrine of Res Judicata Is Not Applicable to this Case because of Section 33 U.S.C. 922 of the Longshoremen's and Harbor Workers' Compensation Act.

The Longshoremen's and Harbor Workers' Act, 33 U.S.C. 901, *et seq.*, in the nature of welfare legislation, was obviously designed and passed to provide a forum for injured workers to present their cases in an informal and uncomplicated manner without requirement of legalistic formalities observed in courts of law.

The deputy commissioner is not required to be a lawyer, and the injured party may proceed (pro-se) without services of a lawyer and without being hampered by a strict and formal observation of the rules of evidence as in regular court practice.

Congress's effort to design an uncomplicated informal forum has created certain handicaps upon the injured claimant in that it failed to provide the injured workman with a:

1. Right of discovery procedures.
2. Right to interrogatories.
3. Method of dealing with adverse witnesses prior to and during the hearing before the deputy commissioner.

(This latter comment will be amplified in the next section of this brief.)

Section 22 (33 U.S.C. 922) of the Longshoremen's and Harbor Workers' Act has the purpose of protecting all parties for a period of one year subsequent to an award by a Deputy Commissioner. It is liberal with good reason. In addition to the consideration that the Deputy Commissioner is not a lawyer and that many parties who present claims are not represented by lawyers, there is no requirement that the Deputy Commissioner make findings of fact and conclusions of law as contemplated by 5 U.S.C. 1007 (b) in law suits. The absence of such findings on undisputive evidence does not require a remand of either administrative or court decisions. *Vandemia* v. *Christaldi,* 221 F. 2d 103, 106 (C.A. D.C. Cir. 1955), *Urbain* v. *Knapp Bros. Mfg. Co.,* 217 F. 2d 810, 816 (C.A. 6, 1954), cert. den. 349 U.S. 930.

Under Sec. 22, the application of any party in interest should be filed within the one year period. In the case at bar, the first decision of the Deputy Commissioner denying benefits was rendered on June 8, 1961. (A-10) The second application was filed 1½ months later. (A-18) Therefore, there was a timely filing and compliance within this section of the Act.

The opinion, by the Court of Appeals (C.A. 7), in this matter cited two reasons why Sec. 22 was not applicable: 1. The Deputy Commissioner was not aware of the January 30, 1961 injury until more than one year after the rejection of the first claim of January 26, 1961; and 2. This section was inapplicable to this case because the claimants at no time disputed the findings of fact made by the Deputy Commissioner on the first hearing.

The first reason given for the inapplicability of Sec. 22 by the Court was clearly erroneous in that the application was filed 1½ months following the rejection

of the claim (A. 18) and not more than one year as stated in the opinion of the Court. The filing of a claim tolls the statute of limitations. *American Mutual Liability Co.* v. *Lowe,* 85 F. 2d 625, 627-628 (3rd Cir. 1936); *Seaboard Marine Repair Co.* v. *Cardillo,* 166 F. 2d 431, 432 (2d Cir. 1948). Furthermore, it should not be contended that the statute of limitations barred this claim for the reason that it was not decided in one year. The courts have uniformly held that Sec. 22 did not require the Deputy Commissioner to file his decision within one year of the prior decision. *Candado Stevedoring Corp.* v. *Willard,* 185 F. 2d 232, 233 (C.A. 2d Cir. 1950); *American Mutual Liability Insurance Co.* v. *Lowe,* 85 F. 2d 625, 627-628 (C.A. 5th Cir. 1936); *Seaboard Marine Repair Co.* v. *Cardillo,* 166 F. 2d 431, 432 (C.A. 2d Cir. 1948).

The second reason given as the basis for not applying Sec. 22 by the Court below was that said section was inapplicable in that there was no dispute of the findings of June 8, 1961. In the case of *Candado Stevedoring Corp.* v. *Willard, supra,* 185 F. 2d 232 at 233, the court said, "that the applicant called the paper he filed a 'claim for compensation' instead of an 'application' for review is of no moment". There was no need for Mrs. Banks to specifically urge that there had been a "mistake in the determination of fact by the Deputy Commissioner" in his decision denying benefits. This proceeding was a continuing challenge to his "determination of fact". The entire evidence in the second claim was intended to show that the previous finding was a mistake in a determination of fact. At the time of the second hearing the Deputy Commissioner was apprised of the defense of res judicata. He knew that the hearing involved the same conflicting death of John Banks arising out of

his employment. He was informed, at the second hearing, that John Banks was hurt on January 30, 1961 and that the respondents had knowingly concealed this at the time of the original hearing. The Deputy Commissioner also was informed respondent had in their possession a written statement obtained by them from an eyewitness at the time of the first hearing which fully informed them of the accident of January 30, 1961. The respondents were the only persons who had knowledge of the evidence of any eye witness and the real facts pertaining to the occurrence of January 30, 1961. Said respondents knowingly withheld said information from the Deputy Commissioner and from the claimants. There were no pretrial discovery procedures available under the Longshoremen's and Harbor Workers' Act to avail them of this information. Fortunately the information pertaining to the eye witness became available approximately one month after the findings denying benefits in the first hearing. The second application was filed alleging the new date of January 30, 1961 as the date of accident and pertaining to a different location of occurrence. The same Deputy Commissioner presided at the second hearing. He heard the witnesses and the facts pertaining to the January 30, 1961 occurrence. He heard the eye witness to this occurrence. He found sufficient evidence to change his original findings denying benefits to a finding allowing benefits, as a result of the occurrence of January 30, 1961. The Deputy Commissioner heard sufficient evidence to support a related and causative reason for John Banks to keel over two hours after he was hit on the top of the head with rope that weighed 30 pounds and fell from a considerable height. This was not the same as in the first hearing where no witnesses testified seeing the decedent injured; where

the only injury was a speck on decedent's forehead and the fact that he had worked for 3 days subsequent to the first alleged occurrence. The Deputy Commissioner was apprised of both occurrences. He was apprised of the defense of res judicata. He heard evidence at the second hearing relating to testimony at the first hearing. Why should the dependent family members be denied their claim for the death of their breadwinner because there was no technical application entitled "modification order" or "application for review"? Why should technicalities be permitted to be asserted in defense to defeat a claim when the sole purpose of a procedure of this nature is to avoid legal formalities that produce harsh results? Under Sec. 22 upon the Deputy Commissioner's own initiative he could have acted to consider this as an application for rehearing or for modification. The fact remains that within the statutory period of limitations a claim was filed wherein it was alleged and proven (before the same Deputy Commissioner who heard the first case) that the decedent was injured in the course of his employment causing his death. Is this a typical result arising from the highly heralded remedial legislation enacted by Congress purporting to protect the longshoremen and harbor workers? Should the sophisticated employer and his insurance carrier be permitted to take advantage of technicalities and successfully assert a defense of res judicata in a situation such as this?

In the case of *Voris* v. *Eikel,* 346 U.S. 328, at 333 (1953) this Court said, "This act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results."

The Court below (C.A. 7) relied upon the case of *Flamm* v. *Hughes,* 329 F. 2d 378, 380 (C.A. 2d Cir. 1964)

as the basis for the reasoning that Sec. 22 is inapplicable because there was no factual dispute within 30 days following the rejection of the first claim. Said case is not analogous here in that there was no second hearing or presentation of additional evidence upon which the deputy Commissioner could act. This case basically challenged the constitutionality of the Longshoremen's and Harbor Workers' Act. There was no subsequent change in conditions which disclosed factual error in the original hearing. Though our Deputy Commissioner had a petition before him which was not expressly labeled "Application for Review" he knew that it was a review of his former findings, and also knew that it was a claim for the error in determining the facts and change of conditions. No evidence could have been presented in the original hearing relative to the January 30, 1961 occurrence because the claimants had no knowledge of any witnesses at that time. However, the respondents knew of such a witness and withheld this knowledge from the Deputy Commissioner and the claimants.

The court below in its opinion seems to indieate that in order for Sec. 22 to be applicable the claimant must file a petition within 30 days disputing the findings of fact of the Deputy Commissioner. This interpretation is clearly erroneous. If this interpretation was correct it would negate the purpose of Sec. 22, as Sec. 22 was expressly intended to authorize the Deputy Commissioner to consider newly presented evidence after a previous determination of facts had become final. It takes effect and becomes final 30 days after the Deputy Commissioner's findings, provided same are not contested. It is to protect the litigants against any injustice that might arise within the one year period subsequent to a finding by a deputy commissioner. The whole purpose of this

section is to prevent the application of the doctrine of res judicata. Cases in support of the position that Sec. 22 applied after the 30 day period in which the findings of the Deputy Commissioner become final are: *Tudman* v. *American Ship Building Co.*, 170 F. 2d 842, 844. (C.A. 7th Cir. 1948); *Stansfield* v. *Lykes Bros. S.S. Co.*, 124 F. 2d 999, 1004 (C.A. 5th Cir. 1942); *Calbeck* v. *A. D. Suderman Stevedoring Co.*, 290 F. 2d 308, 309 (C.A. 5th Cir. 1961); *Jarka Corporation* v. *Hughes*, 299 F. 2d 534 (C.A. 2d Cir. 1962).

2. The Doctrine of Res Judicata Is Not Applicable to the Facts of this Case.

In the event this Court determines that Sec. 22 is not applicable herein, we must respectfully suggest that neither can the doctrine of res judicata be applicable as a defensive measure against the decedent claimant.

This argument is based on the fact that Congress in its zeal for simplification practically legislated the intended proceedings before the intended forum out of any judicial semblance in that it omitted the long fought for judicial safeguards of:

1. pre-hearing depositions.
2. interrogatories.
3. rules concerning adverse witnesses (under the control of the employer or his insurer.)

The reason for simplicity, benign in origin, nevertheless to some degree was necessary to utilize the talents of the legally unsophisticated Deputy Commissioners and those appearing unrepresented before them. However, simplicity can also be a trap for the untrained and unwary injured claimants because the sophisticated advantage of the employer and his insurance carrier even

to the extent of withholding evidence vital to a claimants recovery.

The doctrine of res judicata, an important facet of our jurisprudence, has been continually extended to such a degree by the courts that it no longer remains a simple legal doctrine but has become a complex legal enigma being applied many times to unpredictable and complicated factual situations.

In the present instance the applicability of res judicata is to encourage the practice of possible deceit by employers or their insurance carriers by withholding vital information from injured claimants as a means to defeat their Congress legislated rights. This would be true even in the light of newly discovered evidence.

Congress in passing the Longshoremen's and Harbor Workers' Act did provide against employers from withholding information. The pertinent part of this section (33 U.S.C. 30) are as follows:

> "(a) Within ten days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the Deputy Commissioner in the compensation district in which the injury occurred.
>
> "(b) Additional reports in respect of such injury and of the condition of such employee shall be sent by the employer to the Secretary and to such Dep-

uty Commissioner at such times and in such manner as the Secretary may prescribe."

"(f) Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section the limitations in subdivision (a) of section 913 of this title shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier until such report shall have been furnished as required by the provisions of subdivision (a) of this section."

On May 18, 1961, the date of the first hearing, (A. 77) form #U.S. 202, required to be filed under above section, had not been filed either by the employer or the insurance carrier (accident January 30, 1961), even though the insurance carrier had secured a statement regarding said occurrence from the only eye witness (Mike Miramontez) on April 8, 1961. They alone were completely knowledgeable as to the date, time and place of said occurrence and had also furnished a resume of same to their counsel for his use at the hearing covering this episode of January 30, 1961. (A. 38)

It is therefore obvious that there was no compliance with section 30.

In the case of *Eschbach* v. *Brown,* D.C. Ill. 1949, 84 F. Supp. 825, reversed on other grounds 181 F. 2d 860, the court held that where the employer had full knowledge that the employee was suffering from tuberculosis, employers belief that disease did not arise out of employment did not relieve him of the duty of filing report

required by section 30, and that limitations had not begun to run against employee's claim.

Had the employer and the insurance carrier filed a form U.S. 202 relating to the second occurrence prior to the time of the original hearing there could have been a different result in that the claimant and her attorney would have been knowledgeable and able to investigate the matter. They had no knowledge of the existence of any witness to the alleged occurrence of January 26, 1961. Information which would naturally appear in form U.S. 202 would give claimant access to the necessary information as to the January 30th occurrence. It was the deliberate act of the employer and the insurance carrier to withhold this information contrary to Section 30 that was utilized by the employer and the insurance carrier to bar the injury claim which caused the death of John Banks.

A review of the decisions pertaining to res judicata by this Court indicates that there are certain principles of law applying to this section which are general in nature, and that the facts of each case determines whether or not this doctrine is applicable.

In the case of *Commissioner* v. *Sunnen*, 333 U.S. 591, 597, this Court said, "The general rule of res judicata applies to repetitious suits involving the same course of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on its merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but

as to any other admissible matter which might have been offered for that purpose. *Cromwell* v. *County of Sac.*, 94 U.S. 351, 352. The judgment puts an end to this cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, 'Res Judicata', 38 Yale L. J. 299; Restatement of the Law of Judgments, Sec. 47, 48.

But when the second action between the same parties is upon a different cause or demand, the principle of "res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell* v. *County of Sac, supra,* 353. And see *Russell* v. *Place,* 94 U.S. 606; *Southern Pacific R. Co.* v. *United States,* 168 U.S. 1, 48; *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U.S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Restatement of the Law of Judgment, Sec. 68, 69, 70; Scott, 'Collateral Estoppel by Judgment,' 56 Harv. L. Rev. 1."

In the case of *Ash Sheep Co.* v. *U.S.*, 252 U.S. 159, 170, this Court said: "Rejection of a claim because pursued in an action in which it cannot be entertained does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding. We agree with the Court of Appeals that 'a judgment is not conclusive on any question which from the nature of the case or the forum of action, could not have been adjudicated in the case in which it was rendered."

In the case of *Sherrer* v. *Sherrer,* 334 U.S. 343, 350, this Court said: "Insofar as cases originating in the federal courts are concerned the rule has evolved that the doctrine of res judicata applies to the adjudications relating to the jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate."

In *Reynolds* v. *Stockton,* 140 U.S. 254, 270-271, this Court said, "But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between parties, it must, with the limitations heretofore stated be responsive to the issues tendered by the pleadings."

Section 62, Restatement of Judgments, states that when a judgment with preclusive effect is rendered, the plaintiff cannot maintain an action—upon any part of the original cause of action, although that part of the cause of action was not litigated in the original action except . . . (b) where the defendant's fraud or misrepresentation prevented the plaintiff from including the entire claim in the original action. . . .

Applying the above cited law to the facts of this case we find that the claim of res judicata fails in many respects. To begin with—the first claim involved case No. 46-71 which pertains to an accident of January 26, 1961 at Gateway Elevators, 127th & Calumet, Chicago, Illinois, where decedent was working as a button man. No other issues other than a causal relation were involved. The second matter, No. 46-73, pertained to an occurrence on January 30, 1961 at Norris Elevator, 98th and Calumet River, Chicago, Illinois, where the decedent was working as a tripper. The accident of January 30, 1961 was not in issue in case No. 46-71, since the hearing on case No. 46-71 pertained to an accident which occurred on a different date, at a different place, at a different time, and while the decedent was doing a different job, then obviously those issues were not litigated in the first hearing and the doctrine of res judicata could not be applicable.

Likewise, if the employer and his insurance carrier withheld information that was in their possession at the time of the first hearing concerning a different occurrence (January 30, 1961) and never filed a report of such occurrence as required by Sec. 30 of the Longshoremen's and Harbor Workers' Act they were guilty of a deceitful practice which would have prevented them from asserting the doctrine of res judicata.

In the case of *Stansfield* v. *Lykes Bros., S.S. Co.* (C.A. 5 1941) 124 F. 2d 999, a case under this same act, a Deputy Commissioner originally entered an award on June 6, 1939. On February 1, 1941 he modified the award increasing the award 10%. The new evidence presented during the second hearing consisted of additional testimony on the part of the claimant to the effect that when he raised his arms to shoulder level or above this would

cause a pressure upon the trachea causing certain discomfort. At the time of the first hearing this knowledge was known to the claimant but was not disclosed by him.

On p. 1004 of the opinion the court says:

> "It remains only to inquire whether claimant, knowing at the time of the first hearing, of the disability he now complains of, the pressure on his trachea, by entering into an agreed statement of facts, which did not take this pressure into account in fixing his disability, is precluded from bringing it forward in the second hearing to establish that the commissioner made a mistake in the determination of a fact, the nature and extent of his disability. We do not think so. The statute not only does not authorize, it prohibits settlements or agreements, except those arrived at in certain limited cases and in a certain definite way, affecting the compensation to which claimant is entitled by law. Under these statutes, neither stipulation nor agreement as to the extent of injuries and the amount of compensation to be paid, will estop claimant, or in any manner prevent him from recovering what is justly due him.
>
> "The determination of that is at last for the commissioner. His decision on it, if supported by evidence, is final. The commissioner definitely found, that because of the fact that evidence of the pressure on the trachea was not before him, he mistakenly found the fact as to claimant's disability. The re-award in question here was made to correct that mistake. We find nothing in the proceedings, nothing in the re-award itself, which subjects it to corrective review. The libel should have been dismissed. The decree is reversed and the cause is remanded with directions to dismiss it."

B. IN REFERENCE TO THE FOLLOWING QUESTION: DOES AN ACCEPTANCE OF A COURT ORDERED REMITTITUR, WITHOUT EMPLOYER APPROVAL, SUBSEQUENT TO A PROCEEDING AGAINST AN ALLEGED NEGLIGENT THIRD PARTY, BAR A CLAIM FOR COMPENSATION UNDER 33 U.S.C. 933 (g) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT.

On June 5, 1967 this Court invited the Solicitor General to file a supplemental brief in this matter addressed to the bearing of 33 U.S.C. 933 (g) of the Longshoremen's and Harbor Workers' Act. The petitioner is of the opinion that the brief filed by the Solicitor General clearly and adequately projects the question to the Court and that the filing of an additional brief covering this subject matter would not be of further assistance. We therefore, adopt the argument contained in the brief of the Solicitor General concerning the above question as our argument thereto. The brief of the Solicitor General is set forth as follows:

"On June 5, 1967, the Court invited the Solicitor General to file a supplemental brief in this case, addressed to the bearing of 33 U.S.C. 933(g).

Section 33 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 933, provides that an individual entitled to compensation under the Act who thinks that someone besides his employer is liable in damages to him may bring suit against such third person, and may thereafter obtain a compensation award under the Act against his employer to the extent that the allowable benefits exceed the third-party recovery. If, however, he merely accepts the compensation award without instituting suit against the third person, all his rights against the third person are assigned to the em-

ployer. Furthermore, Section 33(g) of the Act, 33 U.S.C. 933(g), provides that:

> 'If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation * * * only if such compromise is made with his written approval.'

Petitioner's husband, an employee of the respondent Chicago Grain Trimmers Association, Inc., suffered injuries during his employment that resulted in his death. Petitioner instituted a wrongful death action against the Norris Grain Company, claiming that it was responsible for the injuries. After a jury returned a $30,000 verdict in her favor, Norris Grain Company moved the district court to set aside the verdict or to grant a new trial. The district judge ordered that the motion for a new trial stand granted unless petitioner entered in the record a remittitur in the sum of $11,000. Without seeking or obtaining the consent of the Chicago Grain Trimmers Association or its insurance carrier, petitioner accepted the remittitur. Respondent asserts that such acceptance was a "compromise" of petitioner's claim within the meaning of Section 33(g) which, not having received the written approval of the employer, resulted in the forfeiture of any rights petitioner and her children might otherwise have to compensation. The Deputy Commissioner did not rule expressly on this contention, although he necessarily rejected it since he awarded compensation, deducting from the award petitioner's recovery against the third party. The district court upheld the Deputy Commissioner's award. The court of appeals reversed on the ground that *res judicata* precluded the award

of compensation benefits. It did not reach the question whether the award was also barred by Section 33(g). We think it was not.

By its express terms, Section 33(g) is operative only if there is a (1) compromise (2) between an employee entitled to benefits (or his representative) and a third party liable to that employee. Neither of these requirements is satisfied by an order of remittitur. Such an order is an adjudication that damages in excess of a particular amount are not recoverable. See *Arkansas Cattle Co.* v. *Mann*, 130 U.S. 69, 73-74; *Northern Pacific R.R. Co.* v. *Herbert*, 116 U.S. 642, 646-647; 6A Moore, *Federal Practice*, ¶ 59.05[3]. It involves no agreement based on mutual concessions; and certainly it is not the product of agreement between the parties to the litigation. A compromise, on the other hand, does involve an agreement between the parties, and mutual concessions by the parties are an essential element of that agreement. See, *e.g.*, *Lewis* v. *United States*, 17 F. Supp. 543, 546 (D. Col.), affirmed *sub nom. Sanders* v. *Commissioner of Internal Revenue*, 101 F. 2d 407 (C.A. 10); *Ross Packing Co.* v. *United States*, 42 F. Supp. 932, 934 (E.D. Wash.); *In re Lovel Bldg. Co.*, 116 F. Supp. 383, 385 (D. N.J.).

This distinction has been recognized by the New York Court of Appeals in construing the New York employees' compensation act, upon which the Longshoremen's and Harbor Workers' Compensation Act was based.[1] Confronted with the same question—whether an employee's remittitur without the employer's consent constituted a

[1] See *Lawson* v. *Suwannee S.S. Co.*, 336 U.S. 198, 205; H. Rep. No. 1190, 69th Cong., 1st Sess., p. 2 ("The bill follows in the main the New York State compensation law, which is considered one of the best").

compromise—the New York court held that a remittitur of $3,000 dollars of a $5,000 judgment did not constitute a compromise. It stated:

> The judgment for $2,000 was rendered in accordance with immemorial common law practice after a full and constitutional jury trial. The optional order of remittitur and the stipulation of plaintiff pursuant thereto did not constitute a waiver of a jury trial. They were integral incidents of a jury trial actually had which eventuated by constitutional practice in a judgment actually entered * * *. *We think the compromise provision of Section 29 of the Workmen's Compensation Law was not intended to apply to the procedure here in question. Plaintiff's stipulation consenting to take that portion of the verdict judicially determined as being not excessive, does not fall within any recognized meaning of the word "compromise."* [*Gallagher* v. *Carol Construction Co.*, 272 N.Y. 127, 129, 5 N.E. 2d 63 (1936); emphasis added.]

This ruling is in accord with sound policy and legislative purpose. The purpose of Section 33(g) is to make certain that an employee's independent management of his lawsuit against the third person does not operate to the detriment of his employer. See *Bell* v. *O'Hearne*, 284 F. 2d 777, 780 (C.A. 4). The provision thus presumes that a compromise not consented to by the employer may be prejudicial to him and provides for the forfeiture of compensation benefits to void the prejudicial effect. The danger of a compromised settlement to the employer —that it might understate the third party's liability and so increase the employer's—is not presented by a remittitur, which is a judicial determination, in an adversary proceeding, of the maximum recoverable damages. See *Bell* v. *O'Hearne, supra*, 284 F. 2d at 780; cf. *Chapman*

v. *Hoage*, 296 U.S. 526, 532; *Weyerhaeuser Timber Co.* v. *Marshal*, 102 F. 2d 78, 81 (C.A. 9). To be sure, where the employee accepts the remittitur, he foregoes the possibility that at a new trial additional evidence might be presented that would result in an award of greater damages which the courts would allow to stand. Such a possibility, however, is "too remote and fanciful to merit consideration." *Bell* v. *O'Hearne, supra*, 284 F. 2d at 781. Conduct of an employee toward a third party which is not clearly a compromise within the normally recognized meaning of that word, even though unconsented to by the employer, will not work a forfeiture of compensation benefits unless the employer is substantially prejudiced. See *Chapman* v. *Hoage, supra*, 296 U.S. at 532; *Bell* v. *O'Hearne, supra*, 284 F. 2d 780-781; *Weyerhaeuser Timber Co.* v. *Marshall, supra*, 102 F. 2d at 81; *Candado Stevedoring Corp.* v. *Lowe*, 85 F. 2d 119, 120-121 (C.A. 2), certiorari denied, 299 U.S. 588. There has been no such showing of substantial prejudice by the employer-respondent.

In sum, the language and purpose of Section 33(g) support the view that a remittitur is not a compromise. Such an interpretation results in no significant prejudice to the employer and is the only reading consistent with this Court's admonition that the Longshoremen's Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris* v. *Eikel*, 346 U.S. 328, 333.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General."

JULY 1967.

C. THERE WAS COMPETENT EVIDENCE TO SUPPORT A CAUSAL RELATIONSHIP BETWEEN THE FATAL FALL AT HOME AND DECEDENT'S WORK.

In the answer to the Petition for Writ of Certiorari the employer asserted the argument that there was no competent evidence to support a causal connection between the fall at home and decedent's work. Comment is made as to this argument in order to cover all phases of this case.

This argument has been presented to this Court on a number of occasions. Specifically we refer the Court to the cases of *O'Leary* v. *Brown-Pacific Maxon,* 340 U.S. 504, and *O'Keeffe* v. *Smith Associates,* 380 U.S. 359.

On page 508 of the *O'Leary* case, *supra,* the Court said: "Both sides conceded that the scope of judicial review of such findings of fact is governed by the Administrative Procedure Act. Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. Sec. 1001 et seq. The standard, therefore, is that discussed in *Universal Camera Corp.* v. *Labor Board,* ante, p. 474. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole."

On page 361, of the *O'Keeffe* case, the Court first quotes from the case of *Cardillo* v. *Liberty Mutual Ins. Co.,* 340 U.S. 469, from page 478 as follows: "It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. . . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may

not be disturbed by a reviewing court. . . . Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. . . .' *Cardillo* v. *Liberty Mutual Ins. Co., supra,* at 478.

"The rule of judicial review has therefore emerged that the inferences drawn by the Deputy Commissioner are to be accepted unless they are irrational or 'unsupported by substantial evidence on the record . . . as a whole.' *O'Leary* v. *Brown-Pacific Maxon, Inc., supra,* at 508."

In both the *O'Leary* case and the *O'Keeffe* case the Court indicates that though they may have not reached the same conclusion there was sufficient evidence upon which the Deputy Commissioner could have based his finding.

Likewise, in this case there was sufficient evidence in the record to sustain the Deputy Commissioner's finding of fact relative to the injury of January 30, 1961, as was the verdict of the 12 jurors in the 3rd party action in the federal court who heard the same evidence pertaining to the same occurrence and who by their verdict came to the same conclusion as did the Deputy Commissioner that the injury and death of John Banks occurred as a result of the accident of January 30, 1961.

CONCLUSION

We respectfully request this Court to reverse the judgment of the Court below, and to affirm the judgment of the Federal District Court.

Respectfully submitted,

HAROLD A. LIEBENSON
77 W. Washington Street,
Chicago, Illinois, 60602
312-726-9242
Attorney for Petitioner Banks.

EDWARD G. RASZUS
HARRY J. DIRECTOR
MICHAEL J. WEININGER
77 W. Washington Street
Chicago, Illinois, 60602
312-726-9242
Of Counsel.

SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
DEC 26 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 59

AGNES M. BANKS, WIDOW OF JOHN J. BANKS, DECEASED, AND REPRESENTATIVE OF JAMES M. BANKS, JANICE BANKS, AND CATHERINE M. BANKS, MINOR CHILDREN OF JOHN J. BANKS, DECEASED,
Petitioners,

AND

R. C. ENOS, DEPUTY COMMISSIONER,

vs.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC. AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS, CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., AND NEW AMSTERDAM CASUALTY COMPANY.

MARK A. BRAUN,
39 South La Salle Street,
Chicago, Illinois 60603,
Attorney for Respondents.

KLOHR, BRAUN, LYNCH & SMITH,
THOMAS P. SMITH,
39 South La Salle Street,
Chicago, Illinois 60603,
Of Counsel.

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	3
Statutes Involved	3
Statement of the Case	7
Summary of Argument	16
Argument:	
A. The facts of this case require the application of the doctrine of res judicata.	
1. Section 22 does not modify the doctrine of res judicata in its application to the determination of an issue of past fact regarding basic liability	19
2. The facts show a single cause of action	28
B. To label a compromise a remittitur does not make it a judicial determination	36
C. The finding of a relationship between fatal injuries sustained at home and the decedent's employment is a finding unsupported by substantial evidence and must, therefore, be set aside	42
Conclusion	52

CITATIONS.

Arkansas Cattle Co. v. Mann, 130 U. S. 69, 73-74 (1888)	39
Ash Sheep Co. v. U. S., 252 U. S. 159, 170 (1919)	31
Backstrom v. Turner Construction Company, et al., 132 N. Y. S. 2d 126 (1954)	48
Baltimore SS Co. v. Phillips, 274 U. S. 316 (1927)	30, 31

Bay Ridge Operating Co. v. Lowe, S. D. N. Y., 14 F. Supp. 280, 281 (1936) 25

Bell v. O'Hearne, C. A. 4, 284 F. 2d 777 (1960) 42

Bethlehem Steel Co. v. Parker, D. C. Md., 63 F. 2d 334 (1947) 35

Bogdanoff v. Halper, 52 N. Y. S. 2d 625, 626 (1944) ..37, 38

Burley Welding Works v. Lawson, C. A. 5, 141 F. 2d 964, 966 (1944) 25

Butler v. Chicago Transit Authority, Docket No. 40369 41

Candado Stevedoring Co. v. Lowe, C. A. 2, 85 F. 2d 119 (1960) 42

Case v. Calbeck, C. A. 5, 304 F. 2d 198 (1962) 23

Chapman v. Hoage, 296 U. S. 532 (1935) 41

Clyde-Mallory Lines v. Gardillo, D. C. Mass., 22 F. Supp. 40, 41 (1938) 25

Colonna's Shipyard v. O'Hearne, C. A. 4, 200 F. 2d 220 (1952) 47

Commissioner v. Sunnen, 333 U. S. 591, 597 (1947) 30

Commissioners of Taxation and Finance v. General Electric Co., 105 N. Y. S. 2d 543 (1955) 38

Cristiano v. Ninfa Restaurant, 139 N. Y. S. 2d 543 (1955) 38

Duffy v. Fuller, 250 N. Y. S. 2d 108 (1964) 39

Engelhardt v. Bell & Howell, C. A. 8, 327 F. 2d 30, 32 (1964) 30

Gallagher v. Carol Construction Co., 272 N. Y. 127, 5 N. E. 2d 63 (1936) 38

F. Jarka Co., Inc., et al. v. Monahan, D. C. Mass., 29 F. 2d 741 (1928) 22

F. K. Kelter v. Hanks, 234 P. 2d 623 (Sup. Ct. Okla. 1951) 26

Kirby v. Bloomingdale Brothers, 10 N. Y. S. 2d 443, Affirmed 281 N. Y. 856, 24 N. E. 2d 499 (1939) 39

Li Petri v. Turner Construction, 36 Ill. 2d 597, 601 (1967) 41

Marlin v. Cardillo, C. A. D. C., 95 F. 2d 112, 114 (1938) 38, 40

McTaggart v. Lowe, D. C. N. J., 69 F. Supp. 101 (1946) 36

Northern Pacific Railroad Co. v. Herbert, 116 U. S. 642, 646, 647 (1885) 39

Oljenik v. O'Hearne, D. C. Md., 135 F. Supp. 496 (1955) 35

Pillsbury v. Alaska Packers Association, C. A. 9, 85 F. 2d 758, 760, 761 (1936) 25, 27

Reynolds v. Stockton, 140 U. S. 254 (1891) 32

Ross v. State Industrial Court, 394 P. 2d 501 (Sup. Ct. Okla. 1964) 26

Sanderson v. Crucible Steel Corp., 66 A. 2d 188 (1949) 26, 27

Sherrer v. Sherrer, 334 U. S. 343 (1947) 32

Stanfield v. Lykes Brothers SS Co., C. A. 5, 124 F. 2d 999 (1942) 25, 36

Texas Employers Ins. Asso'n v. Sheppeard, D. C. S. D. Tex., 42 F. Supp. 669 (1938) 24

Tudman v. American Ship Building Co., C. A. 7, 170 F. 2d 842, 844 (1948) 25

U. S. v. California & Oregon Land Co., 192 U. S. 355 (1903) 29

Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 487 (1951) 44, 47, 51

Utilities Insurance Co. v. McBride, C. A. 10, 315 F. 2d 553, 556 (1963) 38

Voris v. Eikel, 346 U. S. 328 (1953) 35

Weyerhaeuser Timber Co., et al. v. Marshall, C. A. 9, 102 F. 2d 78 (1939) 42

Weymer v. Industrial Commission, 404 Ill. 271, 275, 88 N. E. 2d 841 (1949) 26

Statutes.

Administrative Procedures Act (60 Stat. 243, 5 U. S. C. § 1009(e)) 50

Judiciary and Judicial Procedures, Supreme Court—Jurisdiction.
Sec. 1254(1) (28 U. S. C. 1254) 2, 4

Longshoremen's and Harbor Workers' Compensation Act.
Sec. 12 (33 U. S. C. 912) 4, 34
Sec. 14 (33 U. S. C. 914) 23
Sec. 21 (33 U. S. C. 921) 20, 21, 27
Sec. 22 (33 U. S. C. 922) 1927 ..... 6, 20
(33 U. S. C. 922) 1934 ..... 6, 22
(33 U. S. C. 922) 1938 24
Sec. 22 (33 U. S. C. 922) 1961 ..... 19-28, 36
Sec. 923 (33 U. S. C. 923) 5, 33
Sec. 924 (33 U. S. C. 924) 5, 32
Sec. 927 (33 U. S. C. 927) 5, 6, 32, 33
Sec. 933(g) (33 U. S. C. 933(g)) 36

Texts.

Larson's Workmen's Compensation Law, Vol. 2, 330 § 81.32, 333 ..... 21, 22

Webster's New Unabridged Dictionary 39, 40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 59

AGNES M. BANKS, WIDOW OF JOHN J. BANKS, DECEASED, AND REPRESENTATIVE OF JAMES M. BANKS, JANICE BANKS, AND CATHERINE M. BANKS, MINOR CHILDREN OF JOHN J. BANKS, DECEASED,
Petitioners,

AND

R. C. ENOS, DEPUTY COMMISSIONER,

vs.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC. AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS, CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., AND NEW AMSTERDAM CASUALTY COMPANY.

REFERENCE TO REPORTS OF OPINION.

The opinion of the Court of Appeals is reported at 369 F. 2d 344 (C. A. 7).

STATEMENT OF JURISDICTIONAL GROUNDS.

Jurisdiction of this court is alleged to rest upon Title 28 USCA § 1254(1).

Section 1254(1) in its pertinent part provides that decisions of Courts of Appeal may be reviewed by the Supreme Court.

> "(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The judgment of the Court of Appeals was entered on July 13, 1966, rehearing denied on October 6, 1966. The parties were Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Co., plaintiffs-appellants, and R. C. Enos, Deputy Commissioner, defendant-appellee, represented by the U. S. Attorney as per statute. (33 U. S. C. 921(a).) None of these parties petitioned for a writ of certiorari at any time.

On January 3, 1967 a telegraphic application for an extension of time was filed by Agnes Banks. Time to file petition for writ of certiorari was extended by Mr. Justice Clark to March 5, 1967. A petition to intervene and a petition for writ of certiorari was filed within the time then allowed by the petitioners and both requests were subsequently granted by this court October 9, 1967.

It is respectfully submitted that the jurisdiction of the court rests upon the timely filing of a petition by a party before the court below. The petitioners here, although fully apprised (A. 105) of the filing of the action below, made no attempt to intervene at any time while the case was pending in the District Court or the Court of Appeals.

It is therefore respectfully submitted that the telegraphic request for extension of time was not made by a

party as required by law to invoke the jurisdiction of this court.

QUESTIONS PRESENTED FOR REVIEW.

1. Can an interested person who had official notice of appellate proceedings below and has failed to seek intervention as permitted by lower court rule seek an extension of time, intervene and thus become "a party" after the entry of final judgment by the Court of Appeals and thus qualify as a person entitled to request issuance of a writ of certiorari by the Supreme Court of the United States?

2. Does the doctrine of res judicata apply to the judicial determination of an issue of fact of past events made by an administrative body?

3. Is the acceptance of $19,000 after a $30,000 jury verdict in an action against a negligent third party a compromise of that action within the meaning of the term "compromise" in the Longshoremen's and Harbor Workers' Compensation Act and thereby a bar to a claim for compensation?

4. Does the record contain substantial evidence as required by statute to prove a relationship between the employee's work and fatal injuries sustained at home when the sole causal connection witness said both *yes*, there is a causal connection and *no*, there isn't, and otherwise contradicted himself?

STATUTES AND REGULATIONS INVOLVED.

In addition to Sections 921(a), 922 and 933(g) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 901 *et seq.*) as set forth on page 3 of petitioner's brief, the following statutes are involved:

Judiciary and Judicial Procedure, Supreme Court—

Jurisdiction, 62 Stat. 928, as Amended, provides the following pertinent provisions (22 U. S. C. 1254):

"SEC. 1254. *Court of Appeals; Certiorari; Appeal; Certified Questions.*

"Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1431, as Amended (33 U. S. C. 912):

"SEC. 912. *Notice of injury or death.*

"(a) Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury (1) to the deputy commissioner in the compensation district in which such injury occurred and (2) to the employer.

(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.

(c) Notice shall be given to the deputy commissioner by delivering it to him or sending it by mail addressed to his office, and to the employer by delivering it to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.

(d) Failure to give such notice shall not bar any claim under this chapter (1) if the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the

injury or death and the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (2) if the deputy commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death."

33 U. S. C. 923 of the Longshoremen's and Harbor Workers' Compensation Act, 64 Stat. 1271, as Amended, provides the following pertinent provisions:

"SEC. 923. *Procedure before the deputy commissioner.*

"(a) * * * Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury. * * *"

33 U. S. C. 924 of the Longshoremen's and Harbor Workers' Compensation Act, 63 Stat. 107, as Amended, provides the following pertinent provisions:

"SEC. 924. *Witnesses.*

"No person shall be required to attend as a witness in any proceeding before a deputy commissioner at a place outside of the State of his residence and more than one hundred miles from his place of residence, unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him; *but the testimony of any witness may be taken by deposition or interrogatories according to the rules of practice of the Federal district court for the judicial district in which the case is pending.* * * *" (Emphasis ours.)

33 U. S. C. 927 of the Longshoremen's and Harbor Workers' Compensation Act. 63 Stat. 107, as Amended, provides the following pertinent provisions:

"SEC. 927. *Powers of deputy commissioners.*

"(a) The deputy commissioner shall have power to preserve and enforce order during any such proceedings; to issue subpoenas for, to administer oaths to, and to compel the attendance and testimony of witnesses, or the production of books, papers, documents, and other evidence, *or the taking of depositions before any designated individual competent to administer oaths;* to examine witnesses; and to do all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office." (Emphasis ours.)

33 U. S. C. 922 of the Longshoremen's and Harbor Workers' Compensation Act, as existing on March 4, 1927, 44 Stat. 1437, provides as follows:

"Upon his own initiative or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time during the term of an award and after the compensation order in respect of such award has become final, review such order in accordance with the procedure prescribed in respect of claims in Sec. 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase, or decrease such compensation. Such new order shall not affect any compensation paid under authority of the prior order."

33 U. S. C. 922 of the Longshoremen's and Harbor Workers' Compensation Act as existing on May 26, 1934, 48 Stat. 807, provides the following pertinent Amendments:

"Upon his own initiative *or upon the application of any party in interest on the ground of change in conditions or because of a mistake in determination of fact by the deputy commissioner, the deputy commissioner may at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, review a case* in accordance with the procedure prescribed in respect of claims in Section 19, * * *" (Emphasis ours.)

STATEMENT OF THE CASE.

Petitioner's statement of the case requires amplification because of its incomplete nature and because of certain inaccuracies.

Inaccuracies noted are as follows. Page 4, John Banks died on February 12 not on February 21. He fell not upon his arrival at home from work but some 20 to 25 minutes after arriving at home, opening some beer, visiting with his wife and James Whalen. There is no evidence to support the statements on page 5 that claimant was notified after the trial of a witness or that at the time of the first trial, Mike Miramontez was unknown to the claimant.

This action was commenced in the District Court for the Northern District of Illinois as an injunction proceeding to restrain the enforcement of an award in favor of petitioners made by Deputy Commissioner R. C. Enos under the Longshoreman's and Harbor Compensation Act.

The Deputy Commissioner had conducted two complete trials or hearings on the issue of whether fatal injuries suffered by John Banks in his home on January 30, 1961 were the result of an accidental injury that arose out of and in the course of his employment.

In the first trial, claim for compensation was denied. (A. 10, 11.) No appeal was taken. Thereafter, suit was brought in the Federal District Court by petitioners against the Norris Grain Company. A $30,000.00 verdict was returned. (A. 20.) $19,000.00 was subsequently accepted in lieu of a new trial. (A. 12.) A second trial was had before the Deputy Commissioner in August of 1963, which resulted in the award in favor of petitioners.

The Deputy Commissioner heard the following as evidence:

John J. Banks had worked as a grain trimmer since 1934

loading and unloading barges and vessels that carried grain. (A. 32.) He was a charter member of the Chicago Grain Trimmers Association and held stock in that company. (A. 79.)

On January 30, 1961 at approximately 4:45 P. M., John J. Banks was seen standing at the head of the basement stairs in his own home at 3520 East 112th Street, Chicago, Illinois. He suddenly came flying head first or like he was shot forward over all of the steps leading into the basement. He did not touch any step, you could have crawled under him. His hands were at his side, he did not cry out. The right side of his head struck the concrete floor causing injuries that resulted in death on February 12, 1961. (A. 32, 33, 79, 80.)

The first claim for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act was filed on February 20, 1961 and assigned number 46-71. It alleged that John J. Banks sustained an accidental injury at work on January 26, 1961 which caused him to fall at home on January 30, 1961 sustaining injuries which resulted in death on February 12, 1961. (A. 77, 78.)

The sole issue before the Commissioner was whether the fall at home which caused the death was a consequence of an injury which arose out of and in the course of the employment. (A. 78.)

Agnes M. Banks, the widow, testified that her husband came home from work on Thursday, the 26th of January, 1961 and told her that he had been hit by a cable that day and his head felt light. She didn't see anything unusual. (A. 78.) The same comment and complaint was made that evening. He asked for aspirin. He worked on Friday and on Saturday, was more quiet than usual and said he didn't feel good before he went to church on Sunday. He did not work his puzzles which was a normal activity on Sun-

day and on Monday morning asked that she not prepare any lunch for him. From January 26th to January 30th she noticed that she could not hold a real good conversation with him as if he was asked a question, he did not answer. She did not notice any pallor about him as his coloring was good. He seemed like he was depressed between January 26th and January 30th. (A. 78, 79, 80.) On Monday, January 30, he worked and came home about 4:00 P. M. Mr. Whalen said he and John Banks had left work at approximately 2:30 and had 3-4 beers in a tavern. A can of beer was opened for each at home. (A. 56.) After Mr. Whalen left, John Banks returned to the head of the stairs and asked to speak to his wife. He said no more but came right through the air like a shot and his head hit the pavement. He never touched the steps but his body stayed so high that you could have crawled under him. (A. 79, 80.)

Lawrence Banks, the President of the Chicago Grain Trimmers Association and brother of John Banks, testified he saw his brother on the 26th of January, 1961 and was told that as a cable had broken on a barge that day, they would have to finish it the next morning. John Banks also said to his brother that the cable had got him. He didn't notice anything unusual about his brother. On Friday morning he saw his brother and John Banks mentioned there was a tiny black speck on his forehead. He did not see him again until Monday morning when he said he was alright. (A. 90.)

Frank Costello, brother of Mrs. Banks and a Trustee of the Grain Trimmers Association, stated he had a conversation with John Banks on Thursday, January 26th. John Banks said he got hit by a cable but did not display any marks or bruises. (A. 91.) All other witnesses, including five other co-workers presented by the claimants and four presented by the respondent, testified that they did not see John Banks get hurt on the 26th and that when they

worked with him on either the 26th, 27th or the 30th, he made no complaint of ill-being. (A. 89, 90, 91, 92.)

Immediately after the accident at home, John Banks was admitted to South Chicago Hospital. He was attended by Dr. Koehler and Dr. Tinsley. (A. 80, 81.) The diagnosis was of alcoholism with cerebral vascular accident not surgical. (A. 87.)

Dr. Spiegel saw John Banks in the South Chicago Hospital once. He considered the possibility of a subdural hematoma. He found that the right upper extremity was paralyzed, the patient was confused and partially aphasic, that there was a history of an injury three days prior to the "cerebral vascular accident", and that three days before falling down the steps, he had been struck on the head by something heavy. Afterwards, he complained of cranial cerebral difficulty, headaches and other things.

Dr. Spiegel stated in answer to a hypothetical question that there might or could be a causal connection between the hypothetical patient's injury by a steel cable and his death. In giving this opinion he considered the nine findings reported by the Coroner's Physician. Also, that as the subdural hematoma progresses, it causes increasingly severe headache and that as it progresses, the symptoms of its presence increase. (A. 85.) That it was not the common thing for the man to pass out suddenly. Normally, it takes two weeks to three months to show symptoms. The acute subdural hematoma is a different phenomenon. It develops very suddenly with extensive bleeding and it kills in a matter of hours. (A. 86.) John Banks died on February 12, 1961.

Dr. Eric Oldberg was called by the employer and responded to a hypothetical question that even if it were assumed that John Banks was struck by a small piece of steel which penetrated the skin of the left temporal area

only, this could not account for the subsequent incident in his home which in turn caused his death. All nine findings contained in the Coroner's report were consistent with the severe trauma to right side of head sustained at home. (A. 85.)

Dr. Oldberg said it would be far beyond the realm of medical certainty for any tiny penetrating wound to have an inciting influence or etiological part in subsequent developments. Even if he had a severe blow to the head, it would be expected that other symptoms would appear, as a subdural hematoma is a slowly progressing thing. It acts much like a brain tumor as it progresses slowly, enlarges and causes pressure and the patient slowly becomes stuporous and develops neurological signs. A five day or a four day interval is very, very short to show symptoms. It could not take place within four days. It takes two weeks. (A. 87, 88.)

On June 8, 1961, the decision of Deputy Commissioner Enos was entered finding that John Banks did die as a result of injuries incurred in the fall at his home on January 30, 1961 but that all of the evidence failed to establish that this fall at home was the result of an injury that arose out of and in the course of his employment on January 26, 1961. (A. 8, 9, 10.)

The claim for compensation was rejected for the reason: "The death of the employee did not arise out of and in the course of his employment." (A. 8, 9, 10.)

On August 22, 1961, a second claim was filed under the Longshoremen's and Harbor Workers' Compensation Act alleging that John Banks sustained an accidental injury on January 30, 1961 which caused fatal injuries in his home on the same date resulting in death on February 12, 1961. (A. 20.)

On September 8, 1961, a libel in admiralty with jury

demanded was filed by Agnes Banks as administratrix of the estate of John J. Banks in the District Court for the Northern District of Illinois against the Norris Grain Company. It alleged that a rope broke and fell on John J. Banks on January 30, 1961 causing subsequent injury at home. $100,000 damages were requested. After argument, damages were limited to a maximum of $30,000. A jury verdict of $30,000 was returned on May 3, 1963. (A. 4, 5.) The defendant, Norris Grain Company, did not question the amount of the damages but moved the court for judgment for defendant notwithstanding the verdict or a new trial on a detailed specification of error. (A. 96, 97, 98, 99.) Judge Holland sitting in the Northern District of Illinois ordered that the motion for a new trial would stand granted unless the libelant within 10 days accepted a remittitur of $11,000. (A. 12.)

On May 17, 1963, Agnes Banks, Admin., as libelant moved the court that she accepted an $11,000 remittitur and requested judgment in the sum of $19,000. (A. 11.) A $19,000 judgment was entered and satisfied.

Thereafter, the employer and its insurance carrier filed a motion with the Deputy Commissioner alleging that the compromise of the District Court action without the employer's written approval barred the claim then pending. (A. 75, 76.)

Over objection, the second hearing proceeded on August 29, 1963. Michael Miramontez, a co-worker of the decedent, said a rope broke and a whole pile of it came on top of the head of John Banks. (A. 24.) The rope had been stretched almost vertically a distance of approximately 50 feet from the hold in a barge to a tower adjacent to the grain elevator. He did not see the rope fall but when he looked at John Banks he was leaning forward with his hands on a hatch cover. The rope was still on his head

and it was coiled up in a tight ball. (A. 26, 27.) Michael McAndrews also worked with John Banks on January 30, 1961. At 2:00 P.M. that day, he heard a cracking sound and looked up and saw rope on top of John Banks. He figured it weighed 25 or 30 pounds. When he saw the rope, it was coiled all over the body of John Banks but wouldn't say the whole works was on top of his head, but a whole lot of it was. The incident described occurred in the Fall of the year. (A. 28, 29.)

The employer presented the testimony of Mr. Olster who worked the same rope that John Banks had that day and he said he could not recall any rope breaking or any rope hitting John Banks. (A. 66.) Other witnesses denied knowledge of the rope breaking or that John Banks made any complaint, even after work, when in a tavern. (A. 69, 70, 71.) Time records established the job was finished between 2:30 and 2:45 P.M. (A. 70.) An employee of the grain elevator said they had no record to show whether or not a rope broke. (A. 71.)

Mrs. Banks testified that her husband came home about 4:30 in the afternoon on January 30, 1961. He was sober. Mr. Whalen was with him. After Mr. Whalen left, John Banks came to the head of the stairs and said he wanted to say something. He stood straight up and then pitched forward. He came through the air without ever touching the stairs with his arms at his side. He never hit the stairs on the way down. (A. 32, 33.) Mrs. Banks stated on cross-examination that when she previously testified before the Commissioner, she reported that her husband had complained of a headache and had taken aspirin in the days preceding January 30, 1961; that he did not want his lunch made for him on Monday morning (A. 34); that when her husband fell down the steps, he never touched any of the steps prior to striking the concrete floor below. (A. 35.) Also, that although none of the grain trimmers

mentioned the rope incident to her at the time of her husband's wake, her son did tell her very shortly after the funeral that John Banks had said to him on January 30th that he got hurt at work that day. The entire matter had been gone over with her attorney before the first trial but Mrs. Banks said she did not mention it to the commissioner when she testified before him in June of 1961. (A. 36, 37.)

Dr. I. Joshua Spiegel was called as a medical expert by the claimant. He had previously testified in the first trial and in the third party action in the District Court. He saw John Banks on one occasion on February 1, 1961 in South Chicago Community Hospital and found that the right side was paralyzed, he was aphasic, he could not speak and a spinal puncture revealed that the spinal fluid was grossly bloody. (A. 40.)

In answer to a hypothetical question which included the rope falling incident and the nine points found in the Coroner's report and other evidence, Dr. Spiegel stated that it was his opinion that the blow from the mass of rope caused him to lose consciousness before he fell from the top of the steps. The reasons were the fact that the man was unconscious when he fell, he was standing, he wasn't moving, that one cannot slip or trip unless he moves. (A. 44, 45.) The doctor was of the opinion that the man had an acute subdural hematoma. On cross-examination he stated that he had previously said under the same hypothetical situation that it was a chronic subdural hematoma. (A. 45.) He also said that he had assumed that the man fell from a standing position onto the steps below. On questioning by the Deputy Commissioner, the doctor stated that it was absolutely impossible for the man to have become unconscious and then pitch over all the steps to the floor below because it was simply too great a distance. It was his opinion that he would necessarily have had to take a good running start to do that or have gone into severe

contractures due to special types of poison or other diseases to accomplish that broad a jump. (A. 54, 55.) Also, that it was true that when a man becomes unconscious from a subdural hematoma, he will slump to the floor and if he were standing at the head of a stairway, he would tumble down the stairs onto the steps themselves. (A. 55.)

Dr. Eric Oldberg was called by the employer. A hypothetical question was presented incorporating all medical facts including the nine findings of the Coroner and the evidence that a quantity of rope fell onto the head of John Banks. (A. 59.) The doctor gave his opinion that he could see no connection between the rope falling incident and the trauma at home two to two and one-half hours later. (A. 62.) The reasons for the opinion were that the hypothetical question contained no facts, medical or otherwise, that would connect anything that could have happened two hours before that would cause a sudden catastrophic thing that precipitated the man down a flight of stairs. There was no known mechanism of the brain which could account for it. If there had been brain damage or anything about the brain affected as a result of the rope falling, then there would have been a march of events ending in unconsciousness. But on reasonable medical grounds, there is no way of explaining an instantaneous unconscious state to precipitate the man down the steps. To the doctor, it just did not happen that way and there could be no connection from a medical standpoint. (A. 62, 63.) It could happen with other types of attacks but it could not be connected with rope collapsing on the man's head. All of the findings of the Coroner's physician were considered in giving the opinion. (A. 63.)

Dr. Oldberg said it was his opinion the massive subdural hematoma was entirely the result of the fall down the stairs. (A. 65.)

The Deputy Commissioner entered findings of fact and an award on January 27, 1964 granting $54.00 per week to petitioners indefinitely according to the provisions of the Act. (A. 13, 14, 15.) The District Court affirmed the award. (A. 103.) The Court of Appeals (C. A. 7) reversed on the ground that the second proceeding was barred by the application of res judicata. (A. 104.)

SUMMARY OF ARGUMENT.

The respondents believe that the Court of Appeals correctly applied the doctrine of res judicata for the reason that the determination in the first hearing is conclusive as to all issues actually tried and litigated as well as those which might have been presented. The parties were identical and the issue was identical, that of whether the fatal injuries at home were related to decedent's employment. There was but a single cause of action and it was incumbent upon the petitioners to present all aspects of the cause or all specifications of alleged contributing cause to the one fatal fall at home in a single trial. Parties are not permitted to withhold an alternative theory for a second trial.

To the suggestion that Section 22 of the Compensation Act permits the reopening of a claim for mistake or change in condition, the respondents reply that the second claim of petitioners was not in the nature of a modification petition and was never considered as such until the decision below issued. That section is applicable only to a mistake or change in condition relative to the physical condition or extent of disability of the employee and is not applicable to retry basic issues of jurisdiction or liability.

The Longshoremen's and Harbor Workers' Compensation Act provides that the compromise of an action against a negligent third party by an employee or his dependent

without the written approval of the employer is a bar to a claim for compensation. Here, the petitioners filed a negligence action against a third party, a $30,000 jury verdict was returned and the dependents then agreed to accept a $19,000 judgment. Respondents contend that the acceptance of the $19,000 judgment was a compromise of the third party claim and for the reason that it was not approved in writing by the employer, it bars the compensation claim. To petitioners' argument that the $19,000 judgment was the result of a remittitur and, therefore, a judicial determination of damages, the respondents reply that the record is clear that on the motion for retrial that preceded the order of remittitur, the issue of damages was not before the court, the court did not and could not have evaluated the damages and, therefore, the remittitur is in the form of a consent judgment which qualifies as a compromise to bar the compensation claim.

Respondents also contend that the finding of a causal connection between the decendent's work and the fatal fall at home is a finding of fact without substantial foundation in the evidence as is required by law.

The review of the case in the District Court was accomplished without oral argument and the Court of Appeals did not reach the issue of the substantiality of the evidence because of the application of the doctrine of res judicata. Therefore, there has not been adequate judicial review of that issue. Because this court has stated that the Congress has imposed upon the courts the responsibility for assuring that the administrative board keeps within reasonable grounds, respondents feel the weight of the evidence must be reviewed as it fails to meet the minimum requirement of being substantial as defined by this court.

The bridge of causal connection between the work and the fatal fall at home is such that it cannot be constructed without the use of expert medical testimony. The only expert who testified said it was impossible to have resulted from any physical condition that might be related to a work trauma.

ARGUMENT.

A. THE FACTS OF THIS CASE REQUIRE THE APPLICATION OF THE DOCTRINE OF RES JUDICATA.

1. Section 22 Does Not Modify the Doctrine of Res Judicata in Its Application to the Determination of an Issue of Past Fact Regarding Basic Liability.

The petitioners' main legal contention now appears to be that although the doctrine of res judicata does or at least may apply to findings of an administrative body, Section 22 of the Longshoremen's and Harbor Workers' Compensation Act creates a special exception to the doctrine. It is now alleged that the second claim filed by petitioners was a Section 22 (33 U. S. C. 922) petition founded on the theory that the Commissioner had made a mistake of fact in the first decision. This is a new contention. It was not made known when the second claim was filed in August of 1961, although respondents answered that second claim (A. 101) and controverted (A. 102) it on the ground that the issues were barred by res judicata. No suggestion was made that the claim was intended as a modification claim based on mistake. In September, 1961, at the prehearing before the Deputy Commissioner, neither petitioners nor the Deputy Commissioner mentioned or considered the claim to be a Section 22 petition. (A. 4.) When the trial commenced on the second claim in October, 1963 (A. 19) res judicata was again alleged, but no one suggested Section 22 as being involved. (A. 19, 20.) On appeal to the District Court it was not suggested that the second claim was in the nature of a Section 22 petition nor was that contention urged in original briefs filed in the Court of Appeals. It was not until the petition in the

Court of Appeals for re-hearing that petitioners decided to call the second claim a Section 22 petition and then only because the Court of Appeals in its completeness had stated that Section 22 could not apply. (A. 115.)

It is not contended by respondents that an employee must precisely label a pleading before the Commission. However, the failure of the parties or the Deputy Commissioner to urge or even discuss the claim as a Section 22 petition is an indication that the nature of the petition as a new claim was recognized by the Commissioner as well as by the parties and their counsel as not within the purview of Section 22 concerning mistake or change of condition relating to disability. The Deputy Commissioner permitted the second claim to proceed because a different date was alleged. (A. 21.) The attitude of all parties correctly acknowledges that Section 22 was not applicable as it could apply only to a claim to modify because of a mistake or a change in condition regarding the employee's degree of disability or physical condition. The legislative history of the section and case decisions demonstrate no broader purpose.

Section 21 alone provides the means to review the fundamental issues of jurisdiction and liability, the finality of which is essential to give certainty to the remedial purpose of the statute. Section 22 was enacted and developed only to provide an effective means by which the Commissioner could fulfill his duty to exercise continuing jurisdiction over the extent of the physical disability of the employee.

In the first Act of July, 1927, Section 22 provided for modification only upon "a change in conditions during the term of an award", and the Commissioner could terminate, continue, increase or decrease compensation. (33 U. S. C. 922, 1927.) The first report of the Commission to the Congress on administration of the Act recommended

a broader reopening provision[1] for the reason there was no provision in either Section 22 or Section 21 to handle the situations which continually arose where the Commissioner sought to correct an error in an order. The type of error is not described, but by comparing the Longshoremen's and Harbor Workers' Compensation Act with antecedent state compensation laws, it may be concluded that the "error" referred to in the recommendation was a clerical error, such as a mistake in computation, designation of the parties or other clerical errors. Many states have provisions to correct that type of error.[2]

There is no provision in the Longshoremen's and Harbor Workers' Compensation Act to modify simple administrative or clerical errors. The 1928 Commission report did recommend that the Deputy Commissioners be given the continuing authority to reopen cases that is usually conferred upon compensation boards. The reopening authority of compensation boards generally is described in Larson's Workmen's Compensation Law, Vol. II at Page 330:

> "This provision is a recognition of the obvious fact that, no matter how competent a Commission's diagnosis of claimant's condition and earning prospects at the time of hearing may be, that condition may later change markedly for the worse, or may improve, or may even clear up altogether. Under the typical award in the form of periodic payments during a specified maximum period or during disability, the objectives of the legislation are best accomplished if the Commis-

1. 12th Annual Report, U. S. Employees' Compensation Commission, 70th Congress, 2nd Session, House Document No. 379, pages 39-40.

2. Ill. Rev. Stat. Ch. 48 § 138.19(f) providing that a decision shall be conclusive, however, the Commission or on motion of either party may correct any clerical error or errors in computation within 15 days after the date of the receipt of the award. In Illinois modification on reopening is permitted only upon change in condition, Ch. 48 Ill. Rev. Stat. §138.19(h).

sion can increase, decrease, revive or terminate payments to correspond to claimant's changed condition. * * *"

The author further stated in § 81.32 at P. 333 when discussing the issues that are relevant in reopening that:

"In a reopening proceeding, the issue before the board is sharply restricted to the question of extent of improvement or worsening of the injury on which the original award was based. If the original award held that there was no connection between the accident and claimant's permanent disability, there is nothing to reopen, and claimant cannot retry the issue of work-connection through the device of a reopening petition. Conversely, when the employee reopens to show increased disability, the insurance carrier cannot raise the basic issue of liability. * * *"

In 1928 in *F. Jarka Co., Inc. et al.* v. *P. J. Monahan,* 29 F. 2d 741 (1928), the court refused to permit the reopening of a claim for additional compensation because the application was made after the expiration of the term of the award. In 1930 the Commissioner's report to the Congress[3] advised that the modification authority "during the term of an award" is not sufficient in the interest of justice and asked for an amendment permitting the reopening at any time.

The May 26, 1934 amendment provided for modification because of "change in condition or because of a mistake in a determination of fact by the Deputy Commissioner". Such modification was permitted "at any time prior to 1 year after the date of the last payment of compensation whether or not a compensation order has been issued". Authority granted by the amendment was to "terminate, continue, reinstate, increase or decrease such compensa-

3. 14th Annual Report, U. S. Employees' Compensation Commission, 71st Congress, 3rd Session, House Document No. 552,

tion''. (33 U. S. C. § 922, 48 Stat. 807.) In the year of the amendment, 1934, the Commission advised Congress[4] that the amendment of Section 22 was not yet complete as there was no provision for reopening or modification where there had been no payment of compensation or when a claim for compensation had been rejected. It was suggested that a reopening be permitted within 1 year after the rejection of a claim in order that all cases would receive equal application of Section 22.

The reference to a rejection of a claim did not mean a finding by the Commissioner of no jurisdiction or no liability because of failure to prove an accidental injury that arose out of and in the course of the employment. The rejection of a claim meant only a finding that no benefits were due at the time of the order. This is obviously a recognition of the fact that in most compensation cases, the employer either immediately commences the payment of compensation after the occurrence, as is his obligation under the statute (33 U. S. C. 914), or reports the occurrence of a compensable accident to the Deputy Commissioner but suggests that no compensation is due, that is, there is no disability for which compensation is payable. In either circumstance, there may be a hearing after which the Deputy Commissioner could reject the claim, not because there is no liability, but because there is no disability and, therefore, no compensation is due at that time.

That the term ''rejection'' of a claim means denial of benefits as of the time of the order even though liability is established appears in *Case* v. *Calbeck*, 304 F. 2d 198 (1962) where the Deputy Commissioner entered an order ''reject-

4. 18th Annual Report, U. S. Employees' Compensation Commission, page 38.

ing'' the claim even though there had previously been a finding in an earlier hearing that an accidental injury had occurred and that certain compensation was due. The development of a neurosis was claimed. It is thus seen that the terminology ''rejection of a claim'' in Section 22 does not refer to the basic liability issue of accident or work connection, but to whether the physical condition resulting constitutes a disability for which compensation is payable.

On June 7, 1938, Section 22 was amended to permit the filing of a claim for modification within 1 year after date of last payment or within 1 year after the rejection of a claim. (33 U. S. C. 922, 52 Stat. 1167, 1938.)

While the courts have expanded the authority to review for mistake beyond the mistakes of a clerical nature, the decisions are not uniform in defining the extent or outer limits of the Deputy Commissioners' authority in reviewing for mistakes with the single exception that such review is confined to a mistake as to the physical condition or condition of disability of the employee. It has been held that on a petition to reopen because of a mistake, the Deputy Commissioner is restricted to a review of the evidence previously presented to ascertain whether it was properly evaluated. *Texas Employers Ins. Ass'n* v. *Sheppeard*, 42 F. Supp. 669, the court said at page 671 referring to the Deputy Commissioner:

> ''* * * He considered and gave the fullest effect to all of the evidence, finally making an award which exhibited a full understanding an appreciation of the evidence and of its effect. * * * The statute does not say, it does not mean, that a compensation proceeding be reopened whenever a party finds a witness who can testify more favorably for him than his other witnesses had done. * * *''

It has nonetheless frequently been held that the Deputy Commissioner in a proceeding to reopen on the ground of mistake is not confined to the prior record, nor is he confined to newly discovered evidence in a Section 22 petition. *Clyde-Mallory Lines* v. *Cardillo,* 22 F. Supp. 40, 41 (1938); *Stansfield* v. *Lykes Brothers,* 124 F. 2d 999 (1942); *Tuddman* v.. *American Ship Building Co.,* 170 F. 2d 842, 844 (C. A. 7 1948). Significant in each of the above cited cases is the fact that, whether the court considered the Deputy Commissioner confined to the prior record or whether additional evidence, newly discovered or not, was considered, in each case the evidence issue pertained only to the degree of disability or physical condition of the employee. The term "change of condition" in Section 22 of the Act means a change in the employee's physical condition and not other conditions. *Burley Welding Works* v. *Lawson,* 141 F. 2d 964, 966; *Pillsbury* v. *Alaska Packers Association,* C. A. 9, 85 F. 2d 758, 760 (1936); *Bay Ridge Operating Co.* v. *Lowe,* 14 F. Supp. 280, 281 (S. D. N. Y. 1936).

The traditional purpose and use of Section 22 has been to re-evaluate the physical condition to determine disability of the employee. In *Pillsbury* v. *Alaska Packers Association,* 85 F. 2d 758 (C. A. 9 1936), a final decision was entered finding relationship of employer-employee, accident and related disability. On a petition by the employee for additional compensation for increased disability, the employer sought to relitigate the issue of the employer-employee relationship. The court held that issue had become final as the finding had not been appealed in accordance with Section 21 and the issue could not be reopened in a Section 22 modification hearing. The court said at P. 761 that:

> "In view of that provision and particularly under the record made out in this case, to permit the jurisdictional fact of employment to be questioned 20 months after the original compensation order would, we think,

result in frittering away the purpose of the Longshoremen's and Harbor Workers' Compensation Act. (See also *United Fruit Co.* v. *Pillsbury* (D. C. 55 F. 2d 369, 370)."

There is no evidence in the statutory history or the decisions interpreting Section 22 that it is intended to permit a review within 1 year of anything other than the physical condition and related disability of the employee. Any other interpretation of the purpose of this section would result in harsh, incongruous, if not absurd, results. In *Sanderson* v. *Crucible Steel Corp.*, 66 A. 2d 188 (N. J. 1949), the Commission initially established that the accidental injury had aggravated the employee's condition of multiple sclerosis so as to cause disability. At a subsequent hearing, when the employee sought increased disability because of the advancement of his condition, the court refused to permit the employer to relitigate the issue of whether the disease had been aggravated by the trauma in the first instance. The finding that an alleged condition has no connection with the employment is final if not directly appealed and cannot be reconsidered on a petition to reopen. *Ross* v. *State Industrial Court*, 394 P. 2d 501 (Okla. 1964); *F. K. Kelter* v. *Hanks*, 234 P. 2d 623 (1951); *Weymer* v. *Industrial Commission*, 88 N. E. 2d 841, 404 Ill. 271, 275 (1949).

The suggestion of the petitioners here that the basic liability issue can be relitigated under the guise of a Section 22 mistake or change of condition petition suggests that even as applied to this case, if compensation is once paid, the employer can thereafter relitigate that liability issue simply by suggesting mistake and by bringing forth some evidence. In this case it might be suggested that there was more than 3 to 4 beers in the tavern before the deceased fell at home. If that is not successful, it could be suggested that a new witness has come forward that knew

of a defective condition of the top step in the Banks' home or that the children's roller skates were normally kept there. Such interminable litigation would hardly effectuate the remedial purpose of this statute. More harsh and incongruous is the effect of the position urged by the petitioners here when it is considered that at the close of the 1966 fiscal year, payments were being made on over 1,000 death awards.[5] In each of those cases the issue is now closed as to whether or not the death of the employee was the result of an accidental injury that arose out of and in the course of his employment. Petitioners here ask this court to so interpret Section 22 that the basic liability issue may be challenged at any time in each open case. That construction would also subject the even more numerous open, non fatal, disability cases to retrial of the liability issue as was attempted in *Alaska Packers and Crucible Steel, ante.*

Considering the statute as a whole, it is apparent that Section 21 (33 U. S. C. 921) is intended to afford all parties a judicial review of all jurisdictional and liability issues by appeal to the District Court within 30 days from the decision of the Commission. If no such appeal is taken, the basic findings become final, subject only to the continuing administrative control vested in the Deputy Commissioner to do justice to the parties by regulating the amount or degree of benefits in accordance with the employee's physical condition or disability. To extend the authority of Section 22 beyond continuing supervision of the disability of the employee as related to his physical condition ignores the structure of the Act as it negates the purpose of the 30 day appeal clause to achieve finality on the issues of jurisdiction and liability.

In Section A-1 of the argument portion of petitioner's

5. Donald Kress, Chief Statistician, Bureau of Employees' Compensation, U. S. Department of Labor, Washington, D. C.

brief, various comments are made with reference to time of filing. The respondents make no specific reply here for the reason that the respondents have never contended nor does the opinion of the court below rest upon any belief or suggestion that 1) a modification petition must be filed in 30 days or 2) that it must be heard within 1 year or 3) that a decision must issue within 1 year. Also, there is no dispute that a proper Section 22 petition may be filed within 1 year from the alleged occurrence or 1 year from the date of the last payment of compensation. The cases cited on page 14 do not support the implication made there by petitioners' brief that Section 22 was intended to prevent application of the doctrine of res judicata. Each case cited deals with the evaluation of disability in a second proceeding after a final determination of liability in a prior proceeding. Each case deals with the question of whether the physical condition justifies that compensation be granted, increased, diminished or in some other manner modified. Not one case cited by petitioners deals with the basic liability issue of accident or work connection between accident and disability or death.

2. The Facts Show a Single Cause of Action. The Actions and Parties Being the Same, the June 8, 1961 Decision of the Deputy Commissioner Is Res Judicata to All Matters Decided and Also to Those Which Might Have Been Decided.

At the commencement of the first trial before the Deputy Commissioner in May, 1961, he recited that it was alleged that the decedent fell down the basement stairs on January 30, 1961 and sustained injuries which caused his death on February 12, 1961. He stated the sole issue was whether the fall which caused the death was a consequence of an injury which arose out of and in the course of employment. (A. 78.) The decision following that trial stated:

"1. The death of the employee did not arise out of and in the course of his employment." (A. 10.)

The second claim also sought benefits under the same compensation statute because of the death of John Banks which death was caused by injuries sustained in his home. The distinction in the two claims is that in the first a single trauma of January 26, 1961 was alleged while in the second a single trauma of January 30, 1961 was alleged. It is here argued by the petitioners that the separate incidents alleged each gave rise to a separate and distinct cause of action against the one employer for the reason that each, either singularly or in combination, was responsible for the subsequent severe traumatic episode in the employee's home.

To hold that each such possible element or factor in an alleged chain of causation constitutes a separate cause of action for a single ultimate damage or loss would be to permit a claimant or plaintiff to subject his opponent to the harassment and vexation of a multiplicity of suits.

In any personal injury action, there are usually multiple specifications of negligence or fault creating a legal liability for a resulting damage. This is also true in compensation proceedings wherein a series of traumatic episodes, strains or other incidents may each contribute to the ultimate appearance of a ruptured disc, hernia or other disabling condition. These specifications may range over many years and include such widely divergent acts or omissions as improper design or construction, faulty supervision of equipment or personnel, failure to warn and actual wilfull and overt aggression.

It has been the announced policy of our system of jurisprudence and it has been the whole tenor of the decisions of this court to require a plaintiff to try his whole cause of action and his whole case at one time. *U. S.* v. *California & Oregon Land Co.*, 192 U. S. 355 (1903).

The principle of res judicata was recently defined in the case of *Engelhardt* v. *Bell & Howell*, C. A. 8, 327 F. 2d 30 (1964), where it was said at page 32:

> "[1] The law of res judicata as it relates to claim preclusion is firmly established. In the subsequent action by the same parties, a judgment on the merits in a former action based upon the same cause of action precludes relief on the grounds of res judicata. The judgment is conclusive not only as to matters which were decided, but also as to all matters which might have been decided."

Petitioners cite *Commissioner* v. *Sunnen*, 333 U. S. 591, 597 (1947). Respondents can accept the general definition of res judicata quoted as being in full support of the ruling below. Petitioners' reference to a modification of the general principles when a second cause of action exists is not applicable here where but a single cause exists. The fact that 2 separate dates were alleged and that was the only reason the Commissioner permitted the second trial does not create a second cause of action any more than excessive speed and faulty brakes preceding an auto collision creates two separate causes of action for damages.

This court has set forth the applicable rule in *Baltimore SS Co.* v. *Phillips*, 274 U. S. 316 (1927) which was substantially relied upon by the court below when it quoted from that opinion as follows:

> "* * * Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.
>
> "A cause of action does not consist of facts, but of

> the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*' " *Ibid.*

Because of the existence of but a single cause of action with identical parties, it was incumbent upon the claimants to assert in one claim all the incidents of employment which singularly or in combination were alleged to have caused the fall in the home. (A. 114.) Petitioners have not specifically challenged the authority of *Baltimore SS Co.* v. *Phillips* nor have they specifically responded to the application of the principles there announced to this case.

Petitioners also apparently agree with the pronouncement of the court below that the doctrine of res judicata is applicable to administrative determinations and that the doctrine should be applied in full force to some administrative action and such is the case when the issue is an adjudication of past facts. The court below we believe has correctly held that in this case an adjudication of past events was required and the claims as to ultimate issues were identical. (A. 116.)

The respondents suggest that the cited case of *Ash Sheep Co.* v. *U. S.*, 252 U. S. 159 (1919) is not contrary to the opinion of the court below as the facts of this case do not involve a situation where any question was presented in

the second action which could not have been determined in the first. The same response is applicable to *Reynolds* v. *Stockton,* 140 U. S. 254 (1891) as the pleadings in both claims filed with the Deputy Commissioner raised the single ultimate issue as to whether the fatal injuries sustained at home were the result of an accidental injury arising out of and in the course of the employment of the decedent. The decision below also is in no way in conflict with this court's opinion in *Sherrer* v. *Sherrer,* 334 U. S. 343 (1947). It is agreed that questions of jurisdiction are not exempt from the application of res judicata.

Both points A-1 and A-2 of the argument commence by complaining that the procedures at the Commission deprive them of an opportunity to become fully informed and that sometimes petitioners appear pro se and, therefore, res judicata should not apply.

The first Complaint regarding the absence of discovery procedures is incorrect as Section 24 of the Longshoremen's and Harbor Workers' Compensation Act specifically provides:

> "* * * the testimony of any witness may be taken by deposition or interrogatories according to the rules of practice of the Federal District Court for the judicial district in which the case is pending * * *". (33 U. S. C. 924.)

This record also discloses that on September 21, 1961 the petitioners requested an indefinite postponement of the second trial and thereafter took depositions and filed interrogatories in connection with the District Court action. That same procedure was available initially.

Section 27 of the Longshoremen's and Harbor Workers' Compensation Act provides that the Deputy Commissioner shall have the power among other things to compel the attendance and testimony of witnesses, the production of

books, papers and documents and "the taking of depositions before any designated individual competent to administer oaths." (33 U.S.C. 927.)

Petitioners' excuse for withholding their knowledge of an alleged accident on January 30 is that they did not know of an eye witness. This is likewise without substance as petitioners in the first trial utilized Section 33 of the Compensation Act which permits the introduction of declarations of a deceased person even to the parties interested in the litigation. Section 33 provides in part that:

> "Declarations of a deceased person concerning the injury in respect of which the investigation or injury is being made or the hearing being conducted shall be received into evidence and shall if corroborated by other evidence, be sufficient to establish the injury." (33 U.S.C. 923.)

In the first trial Mrs. Banks (A. 78), her brother, Frank Costello (A. 91) and Lawrence Banks, brother of decedent (A. 90) each testified by utilization of Section 23.

The procedure, therefore, affords the same discovery advantage as in the District Court and substantially liberalizes the rules of evidence to the advantage, not the detriment, of the compensation petitioner. Strict application of the doctrine of res judicata is required when it is considered that the circumstances surrounding the fatal injuries of John Banks in his own home are details particularly within the special knowledge and the control of the petitioners. The petitioners' advantage is compounded by the fact of their close association, if not control, of all of the circumstances surrounding the personnel and activities of the Chicago Grain Trimmers Association, Inc.

On page 19 petitioners cite the Restatement to the effect that fraud or misrepresentation which prevents the plaintiff from including the entire claim in the original action would

prevent the application of the doctrine of res judicata. Petitioners offer no authorities or definitions or even factual argument to support the prejudicial innuendo.

The suggestion that the carrier withheld information because the April 4, 1961, interview with Mike Miramontez was not reported to the Commission completely fails to take into account that knowledge of this interview was in the possession of the carrier only in the form of a memo. Also that the memo advised the carrier that Miramontez had referred to a rope falling incident on January 30; that the incident had been completely checked out and was totally uncorroborated by any other person at that job site that day and further, it allegedly occurred at a time shown to be long after all men had left the site and, therefore, in the opinion of the investigator, was an afterthought. Subsequent testimony by Mike Miramontez showed that he said he had worked with John Banks the entire day of his rope falling incident. The records of the company and the testimony of other witnesses show that John Banks worked at an entirely different location from Mike Miramontez on the morning of January 30, 1961. The witness again repeated that he thought the incident occurred after 2 o'clock; that it took some time near a half hour to repair the rope and the men then worked for another 2 hours. This positively could not have been January 30, 1961.

Under those circumstances the filing of a notice of an accident would be more of a misrepresentation than a compliance with the Act.

The question of notice however is not without significance in this case. If the petitioners contend that an accidental injury did occur on January 30, the first burden was with the petitioners to file a written report with the employer and with the Deputy Commissioner as is provided by Section 12 of the Act. (33 U. S. C. 912.) Petitioners here

contend that they had information that John Banks was injured on January 30 at work. Mrs. Banks discussed it with her son in mid February (A. 36); she went over the entire matter involved with her attorney prior to the filing of the claim on February 21, 1961, and also went over the matter with her brother, Frank Costello, and with her brother-in-law, Lawrence Banks. (A. 36, 37.) Not only did the petitioners fail to file the written notices required by statute, Mrs. Banks, Lawrence Banks, and Frank Costello, each testified on behalf of petitioners at the first trial and each failed to give notice orally or in writing at that time but concealed the alleged information which they now contend is a basis for a valid claim.

If the petitioners had complied with the statute and given written notice of the alleged rope fall of January 30, the carrier would have been compelled to file within 10 days an answer to the claim as they did after the second claim was actually filed (A. 110), and thereafter would have been required to file Form U. S. 207, a statement that the claim would be controverted setting forth the reasons for controverting the claim. (A. 102.)

The failure to give notice as required may be excused by the Deputy Commissioner and the compensation order in this case recites that the failure to give notice did not prejudice the employer. Such prejudice may be presumed if the employer had knowledge, but that knowledge must exist within 30 days of the alleged accident. *Bethlehem Steel Co.* v. *Parker,* D. C. Md., 63 F. 2d 334 (1947). Here the equivocal interview with Mike Miramontez was held on April 4. The Commissioner's finding that the failure to give notice was excused does not meet the test that some satisfactory reason must be given for so excusing the failure. *Voris* v. *Eikel,* 346 U. S. 328 (1953). Rather, the failure of the petitioners to give notice requires the rejection of the claim. *Oljenik* v. *O'Hearne,* D. C. Md., 135 F.

Supp. (1955); *McTaggart* v. *Lowe;* D. C. N. J., 69 F. Supp. 101 (1946).

The extensive citation by petitioners of *Stansfield* v. *Lykes Brothers S. S. Co.*, C. A. 5, 124 F. 2d 999 (1942), does not go to the issue of res judicata. The only issue there was the physical disability of the employee in a Section 22 modification hearing. The Court acknowledged that consideration of facts previously known to the employee was an exceptional extension of the scope of a Sec. 22 petition. The Court justified the extension by pointing out the first hearing was not final in any sense as it was by stipulation which is a practice prohibited by the Act. The case does not provide authority to justify the withholding of alleged pertinent information by Mrs. Banks prior to the first trial, particularly when all of the circumstances were reviewed with her lawyer prior to that first trial.

B. TO LABEL A COMPROMISE A REMITTITUR DOES NOT MAKE IT A JUDICIAL DETERMINATION.

There is apparent agreement among the parties before this court that if the acceptance of $19,000 in final disposition of the claim of Agnes Banks against the Norris Grain Company after a $30,000 verdict was a "compromise" of that claim, then the compensation claim is barred by the terms and provisions of Section 33(g) (33 U. S. C. 933(g)).

Section 33(g) provides in part as follows:

> "(g) If a compromise which such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall become liable for compensation as determined in subdivision (f) of this section *only if such compromise is made with his written approval.*" (Emphasis ours.)

There is no dispute that petitioner accepted $19,000 after a $30,000 verdict and executed a final release to the Norris Grain Company without the written approval of the employer. The chronology of events leading to the acceptance of the $19,000 is that on May 30, 1963 a jury returned a verdict of $30,000. The defendant, Norris Grain Company, moved for judgment in accordance with motion for directed verdict or for a new trial. (A. 96.) The motion specified 9 paragraphs of error plus subparagraphs not one of which questioned the propriety of the amount of damages or requested that the court evaluate or ascertain the fair or maximum damage. The petitioners here nonetheless argue that damages were judicially determined solely because an order of remittitur with written acceptance by plaintiff was used to terminate the pending case.

Similar attempts to avoid the clear provision of the statute have been thwarted by the New York Courts by simply recognizing the true nature of the court order used to effect a compromise. In *Bogdanoff* v. *Halper,* 52 N. Y. S. 2d 625 (1944) the court entered a directed verdict during the course of the trial after negotiations between the parties. The directed verdict was recognized as nothing more than a means of effecting the compromise as was the remittitur order here. In that case the court said at page 626:

> "(1) I take it to be elementary that a trial justice cannot, on the trial of a negligence action, direct a verdict for the plaintiff for a specific sum without the assent of the defendant. If there is assent then there is a compromise, in every substantial sense of the term. The judgment entered thereon is merely the means used to render the compromise effectual. Obviously the defendants in claimant's case admitted liability in an amount certain, and the action of the judge and jury relative thereto was merely pro forma. If an impregnable barrier of sanctity is to bar an attack upon a judgment of that character, which in sub-

stance is a judgment by confession, then a very easy and effectual method has been found to circumvent the requirements of Section 29 of the Workmen's Compensation Law. That section requires the written consent of the carrier and employer to any settlement before the claimant may thereafter ask the Industrial Board to consider a claim for deficiency compensation."

"* * * I regard the direction of a verdict for a specified sum as proof as a matter of law that there must have been a compromise."

Likewise in the case of *Marlin* v. *Cardillo*, 95 F. 2d 112 (C. A. D. C. 1938), the vehicle of a consent judgment was used to effectuate the compromise.

Petitioners rely on the 1936 case of *Gallagher* v. *Carol Construction Co.*, 272 N. Y. 127 (5 N. E. 2d 63). The case is clearly inapposite for the reason the court was asked specifically to determine damages on a motion to set aside the verdict as excessive. The only issue before the court was the claimed error of excessiveness of the verdict. Here, in spite of the length of the motion for a new trial, not a single reference is made questioning the amount of the verdict. (A. 97, 98, 99, 100.) The later New York decision of *Bogdanoff* v. *Halper ante* demonstrates that the New York courts correctly limit the application of the *Gallagher* case to a situation where it is apparent from the record that the trial judge did, in fact, evaluate damages prior to the entry of the remittitur order. The courts in various jurisdictions are in accord that a compromise given effect through any type of agreed order of court will bar any future claim for compensation if such disposition is achieved without the written consent of the employer. (*Utilities Insurance Company* v. *McBride*, 315 F. 2d 553, 556 (C. A. 10, 1963); *Commissioners of Taxation and Finance* v. *General Electric Company*, 105 N. Y. S. 2d 929 (1959); *Cristiano* v. *Ninfa's Restaurant*, 139 N. Y. S.

2d 543 (1955); *Kirby* v. *Bloomingdale Brothers,* 10 N. Y. S. 2d 443 Affirmed, 281 N. Y. 856, 24 N. E. 2d 499 (1939); *Duffy* v. *Fuller,* 250 N. Y. S. 2d 108 (1964).

The cited decisions of this court in *Arkansas Cattle Co.* v. *Mann,* 130 U. S. 69, 73-74 (1888); and *Northern Pacific Railroad Co.* v. *Herbert,* 116 U. S. 642, 646-647 (1885), demonstrate only that an order of remittitur *may* be the result of a judicial determination of the issue of damages. In each case the trial court which entered the remittitur order had before it and was requested to reverse or order a new trial because damages awarded were excessive.

In *Northern Pacific Railroad Co.* a motion for a new trial was made on various grounds chief of which was that the damages were excessive. The court evaluated the damage elements or evidence in the trial and directed the remittitur. In *Arkansas Cattle* v. *Mann,* 130 U. S. 69 (1888), this court commented on the fact that the trial court had been asked to evaluate the damages and had the elements or evidence as to damages beforehand. That action is no different than occurred in the case of *Gallagher* v. *Carol Construction Co.,* 272 N. Y. 127, 5 N. E. 2d 63 (1936) which is clearly distinguishable from the facts of this case wherein the damage issue was not before the court on the motion for a new trial. The court on the motion made no ascertainment on the damage issue, he did not observe or investigate the issue as there was never any dispute that the damages were at least $30,000, if there was liability. Therefore, there was no judicial determination of damages. Although it is apparent the issue of damages was not before the court, there was nonetheless a disposition of the claim which was completed without appeal or objection by either party which necessarily establishes that there was an abatement of extreme positions, a mutual agreement by concessions, a compromise. Webster's New Unabridged Dictionary defines compromise as:

"Compromise, n. The mutual promise to abide by the decision of an arbiter. 1) A mutual agreement to refer matters in dispute to the decision of Arbitrators. 2) A settlement by arbitration or by consent reached by mutual concessions; a reciprocal abatement of extreme demands or rights, resulting in an agreement; composition. * * *

"v.t. 1) To adjust and settle (a difference) between parties; 2) To bind by mutual agreement; 3) To adjust and settle by mutual concessions; to adjust and settle by compromise * * *"

"v.i. 1) To come to agreement by concession. 2) To make a practical adjustment of rival courses, opinions or principles, by partial concessions."

The definition establishes that even if the parties engaged the good offices of the court to assist in reaching a dollar settlement of the liability issues, that resolution is still within the dictionary definition of compromise and as that disposition was effected without the written consent of the employer, the compensation action is barred. (33 U. S. C. 933(g).)

There has never been a determination in this case as to whether the conduct of the parties constituted a compromise. The Commissioner said it was a question of law and he would not rule upon it. The District Court simply adopted the finding of the Commissioner which made no reference to this issue and the Court of Appeals did not reach the issue because of their holding that the doctrine of res judicata applied.

In spite of the fact that the knowledge of all the circumstances which surrounded the disposition of the negligence action without the employer's signature, was in the control of the petitioners and was not produced, it is suggested that the employer must show prejudice. Not only is prejudice presumed, *Marlin* v. *Cardillo*, C. A. D. C., 95 F. 2d 112 (1938), but the prejudice is apparent in the accept-

ance of $11,000 less than the jury verdict. Prejudice here can also be shown by the fact that when the negligence action was first filed a $100,000 *ad damnum* was prayed. On motion the court reduced it to a maximum of $30,000 upon a ruling that the recovery was limited to the maximum amount permitted by the Illinois Wrongful Death Statute. An active legal controversy existed at that time as to the propriety and constitutionality of the $30,000 wrongful death limitation of the Illinois statute. Since that time, the Illinois Supreme Court has ruled that the $30,000 limitation does not apply to certain statutory actions, *Li Petri* v. *Turner Construction,* 36 Ill. 2d 597, 601 (1967), the limitation has been removed prospectively in all cases by action of the 1967 Illinois General Assembly and the general constitutionality of the limitation is under constitutional attack in the pending case of *Butler* v. *Chicago Transit Authority,* Docket No. 40369. S. C. of Ill.

If the case of *Banks* v. *Norris Grain* had not been settled, it could have been pursued with a possible unlimited recovery which, if accomplished, would have relieved respondents of any possibility of a deficiency compensation award. This possibility for the reasons just cited is not fanciful, but a real possibility which was irrevocably thwarted by petitioners' compromise settlement without the written consent of the employer. The statute permits the injured employee or his dependents in a third party action to control that action, but with cognizance of the employer's right. The employer's rights here were ignored and the statutory penalty is clear. The subsequent compensation action is barred.

The cases cited on page 26 by petitioners do not hold that substantial prejudice must be shown, but rather show as in *Chapman* v. *Hoage,* 296 U. S. 532 (1935), that the dismissal of an action which has been established as without merit did not constitute a compromise so as to the bar the

January 30 and, further, that he subsequently struck his head against a concrete floor in his own home which blow caused severe injuries that brought about death on February 12, 1961. To the question as to whether there might or could be a causal relationship between the rope incident and the fall at home, the doctor gave a "yes" answer. (A. 44.) In determining whether that answer is substantial evidence to prove the fact, the reviewing court must take into account whatever fairly detracts from the "yes" answer. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 487. In this case, the same witness also gave a "no" answer. (A. 54, 55.)

Not only does the "no" answer detract from the substantiality of the "yes" answer, but it is of greater weight and of greater substance as the "no" answer was given after the Deputy Commissioner clarified for the witness the evidence and the contents of the hypothetical question. (A. 54.)

It was first demonstrated that the "yes" answer was given because the doctor assumed two facts which were not in the question. The doctor assumed prior good health, while, in fact, Mrs. Banks admitted that when she previously testified before the Commissioner in the first trial concerning the death of her husband, she stated under oath that in the 3 days prior to January 30, he had complained of headaches. (A. 33.) He complained of lightheadedness and that it was impossible to hold a conversation with him because he would not answer a question. (A. 78, 80.) The doctor also assumed that the man had fallen forward onto the steps immediately below him. (A. 51.) When the actual facts in evidence were given to him by the Deputy Commissioner, he said no, emphatically no, the incident at work could not have caused that type of fall. (A. 54, 55.)

The retraction of the single bit of evidence establishing a causal connection is seen by the following testimony given before the Deputy Commissioner:

"Deputy Commissioner Enos: The testimony is that this gentleman came to the top of the stairs and he pitched forward, and went down the stairs, not touching the stairs with any part of his body; that he fell, struck his head on the concrete floor below. I would like to know whether or not from a medical standpoint that sort of thing is practical?

The Witness: It's impractical. It's impossible not to touch the steps, because the hypothetical describes two walls, so he couldn't fall down the stairwell. He had to fall forward down the continuity of steps.

Q. There was a set of 11 steps there.

A. He would have to fall forward.

Q. The testimony is that he pitched forward down those steps and no part of his body touched those steps as he went down.

A. *I do not see how that is possible, unless as I told Mr. Braun, he took a running start.* To clear the steps would be—if the step was 10 inches, 110 inches, it would almost be 10 feet.

Q. Do you know of any medical—anything in the medical literature that would account for anything like that?

A. No, sir. He couldn't clear 10 feet. It is approximately 10 feet. I just figured it out, 11 steps, and if he is falling down like this (indicating), if he is falling even just like this (indicating), as he fell *he has to fall on the steps.* Ten feet is a respectable broad jump. Here is 10 feet, from here (indicating) to here.

Q. You could not explain that from a medical standpoint how a man could pitch forward and clear the entire steps, land on his—

A. There are some rare diseases, like tetanus, certain poisons, where the muscles go into tremendous contractions, and in fact that is what kills the patient.

Q. You did testify, did you not, Doctor, that in your

opinion the cause of this man falling was loss of consciousness by reason of an acute subdural hematoma?

A. I did, yes, sir.

Q. What would be the natural reaction?

A. Just a fall—

Q. Would he have a tendency to slump?

A. He could slump.

Q. And tumble down the stairs?

A. Yes, he could.

Q. I presume if he was unconscious when he started, that that would account for the fact that he did not use his arms to protect himself in any way going down?

A. That is a proper assumption. He could fall straight. He wouldn't of necessity have to slump down into a huddle. He could fall straight down and continue falling, *but he would have to hit the steps.*" (A. 54, 55.) (Emphasis ours.)

Knowledge of what happened in the Banks' home on January 30, 1961 was solely in the possession of Mrs. Banks and her children, the compensation applicants. Mrs. Banks testified in both hearings before the Deputy Commissioner that John Banks did not fall onto the steps; that his body did not strike any of the steps but was projected over all of the steps to the concrete floor below. (A. 33, 79, 80.) Their sole causal connection witness, Dr. Spiegel, was of the opinion the man had an acute subdural hematoma that caused sudden unconsciousness. He insisted, however, that sudden unconsciousness from an acute subdural hematoma could not project a person over an entire flight of 11 steps. The condition he thought was present in his opinion would cause a person to slump to the floor or fall onto the steps immediately below. It could not cause him to be projected over all the steps as was the uncontradicted evidence by the only person to witness the fall at home.

The action of the Commissioner here in accepting the

first comment of the doctor and ignoring the subsequent retraction of that opinion is much like the situation in *Colonna's Shipyard* v. *O'Hearne,* 200 F. 2d 220 C. A. 4 (1952). There, the treating physician stated that when he first saw the patient, he felt the condition was related to his work. This first impression, however, was proved to be erroneous by subsequent medical tests and surgery. He then said there was no connection. The Commissioner nonetheless accepted the first and awarded compensation. In reversing the Deputy Commissioner, the court stated at p. 223:

> "* * * the judgment must be reversed, because the findings of the Deputy Commissioner are not supported by substantial evidence on the record considered as a whole."

The practice of viewing certain evidence tending to support a favored position and viewing that evidence in isolation apparently was not an uncommon practice by certain administrative agencies prior to 1946. In the case of *Universal Camera Corporation* v. *National Labor Relations Board,* 340 U. S. 474 (1951), the court referred to that evil and commented that Congress specifically intended to correct the situation by inserting in the Act of 1946 the words "the court shall review the whole record", and stated at p. 487 that:

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account the contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. * * *"

compensation claim. In *Weyerhaeuser Timber Co., et al.* v. *Marshall,* C. A. 9, 102 F. 2d 78 (1939), a collateral action had determined that no cause of action existed for the recovery of damages. The dismissal therefore of a worthless action did not constitute a compromise. In *Candado Stevedoring Co.* v. *Lowe,* C. A. 2, 85 F. 2d 119 (1960), the third party action in fact had been transferred to the employer within the period of limitations by the employee's filing with the Commission. He, therefore, had not compromised it and the employer still had his right of subrogation.

Likewise *Bell* v. *O'Hearne,* C. A. 4, 284 F. 2d 781 (1960), in no way affects the issue. Here there is an actual compromise and clear actual prejudice to the employer, there the settlement after verdict was held not a compromise only because the full amount of the verdict was credited to the employer.

C. THE FINDING OF A RELATIONSHIP BETWEEN FATAL INJURIES SUSTAINED AT HOME AND THE DECEDENT'S EMPLOYMENT IS A FINDING UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND MUST THEREFORE BE SET ASIDE.

The respondents present this issue not unmindful that this Court has held that this is not the place to review a conflict of evidence nor to reverse a Court of Appeals solely on fact issues which are of importance to the immediate litigants only. It is also recognized that it is the function of the Deputy Commissioner to draw inferences and conclusions of fact from the evidence presented and that such inferences are binding upon courts of review if not contrary to law and supported by substantial evidence. The respondents here contend that the finding of a relationship between the decedent's work and the fatal injuries is not supported by substantial evidence as required by law. The decision below precluded judicial review of the issue of substantiality.

At the second trial before the Deputy Commissioner 2 witnesses were presented to establish the occurrence of an accident. The first, McAndrews, said that he saw a rope fall about John Banks on the last day he worked and that this was in the Fall of the year. (A. 29.) John Banks died on February 12, 1961. The witness upon which petitioners rely was Michael Miramontez who testified that he worked with John Banks on January 30 and as they worked a rope was stretched from a hold in a barge to a point approximately 50 feet above and behind John Banks. This rope broke and as it fell coiled into a ball and landed on the head of John Banks. It remained in this position, even as he leaned forward over a hatch cover. (A. 26, 27.)

The respondents here contend that even if it is assumed that the rope fell precisely as witness Miramontez said, this record does not contain substantial credible evidence to support a fact finding that there is a relationship between that incident and the fall at home some 2½ hours later.

The determination of that essential fact issue necessarily requires the application and understanding of scientific medical knowledge as there is no obvious chain of events or symptoms bridging the time period. During the interval between the alleged incident and the fall at home, Mr. Banks drank beer in a local tavern with co-workers and visited with his wife; there was no complaint by him and there was no exterior symptom of injury of any kind.

Respondents contend that the single witness to establish the causal connection did not give credible proof, but rather directly contradicted himself on the issue and otherwise was impeached. His testimony is not substantial by any standard. Dr. Spiegel was given a hypothetical question incorporating as fact that a quantity of rope weighing approximately 20 pounds had fallen on the head of John Banks at approximately 2:00 to 2:30 PM on

Further detracting from the weight of the testimony of Dr. Spiegel is conflict between his opinion of what caused Mr. Banks to become unconscious at home and the opinion of his partner, Dr. Tinsley, who actually attended Mr. Banks at the hospital. Dr. Spiegel said it was an acute subdural hematoma. (A. 45, 54.) Dr. Tinsley and the family doctor signed the hospital record certifying that the diagnosis was alcoholism with a CVA (cerebral vascular accident). (A. 49, 50.) In *Backstrom* v. *Turner Construction Company, et al.*, 132 N. Y. S. 2d 126 (1954), a conflict between the opinion of a nontreating but testifying physician with the opinion of the treating physician was found to render the nontreating physician's opinion insubstantial to a sufficient degree to require the reversal of an award by the Commissioner. In that case, the conflict existed between attending physicians, including the surgeon and the opinion of a physician who never saw the decedent and whose opinion was based, in part, on mistaken fact. In this case, Dr. Spiegel did see the decedent once but his opinion was also based in part upon mistaken facts. In the *Backstrom* case, the court said at p. 127:

> "Such a state of the record does not satisfy the substantial evidence rule, and when the record is considered as a whole, there is no substantial evidence to support the award."

In this case when Dr. Spiegel was asked about the contrary opinion of the treating family doctor that the man's condition was the result of alcoholism with cerebral vascular accident, he simply stated: "Well, he has the same right to error as has my partner." (A. 50.)

Not only is there a difference between Dr. Spiegel and the treating physician as to what pathological condition existed, but Dr. Spiegel directly contradicted his own prior sworn testimony.

When Dr. Spiegel testified in the negligence action in the Federal District Court in May of 1963, he said John Banks had a chronic subdural hematoma, not an acute subdural hematoma. In the Federal Court he testified as follows:

> "Q. So you would say that he *did not have an acute subdural episode?*"
>
> "A. No, he didn't.
>
> "Q. You are saying that the kind of subdural hematoma that he had was a chronic one?
>
> "A. He eventually died from that. Yes." (A. 48.)

He agreed that the hypothetical question in this case was virtually the same as the one given to him in the Federal District Court. (A. 48.) In this case he testified as follows:

The Commissioner.

> "Q. You did testify, did you not, doctor, that, in your opinion, the cause of this man falling was a loss of consciousness by reason of an acute subdural hematoma?
>
> "A. I did, yes sir." (A. 55.)

The opinion of the sole causal connection witness in this case is, therefore, seen to be directly contradictory to his prior sworn testimony in the District Court. There man had a chronic subdural hematoma, which is slight bleeding and enlarges by an osmotic process. (A. 45.) In this case, he said the same man had an acute subdural hematoma, one of the deadliest lesions known which kills in hours (A. 45, 86), and in which there is no osmotic process. (A. 51.) Dr. Spiegel was also willing to assign whatever cause is presented as the direct cause of the fall at home. In the first hearing he said it was an incident at work on January 26 that caused the man to fall on January 30. In the second hearing, it was an alleged incident occurring only 2 hours before the fatal fall at home on January 30, 1961.

Standing alone, the testimony of applicant's sole causal connection witness does not constitute substantial evidence to carry the burden of proof. The "no" answer to the hypothetical question given by the doctor to the Commissioner in and of itself negates the previous "yes" answer and renders the record without proof of a relationship between the employment and the fatal fall at home.

Dr. Oldberg consistently testified in each case that all significant findings upon admission to the hospital and all findings upon autopsy were consistent with the trauma on the concrete floor in decedent's home. (A. 63, 88.) It was far beyond the realm of medical certainty for the alleged incident at work to be an inciting or etiological part in the subsequent development. People don't get subdural hematomas and go on normally for 4 or 5 days and suddenly lose consciousness. (A. 89.)

Even if it were assumed that he had been struck on the head on January 30 by a quantity of rope, there is no way medically that you could connect anything that could have happened two hours before that would give a latent period of complete well being and then a sudden catastrophic thing that precipitated him down the flight of stairs. There is nothing that Dr. Oldberg knew of as far as the mechanism of the brain was concerned that could produce that result. (A. 63.) If there had been brain damage from a trauma to the head, there would be a march of events that might have ended in unconsciousness, but there is no reasonable ground to explain why a couple of hours after a trauma, the individual would instantaneously lose consciousness. That simply does not happen in his experience and there is no connection between the two from a medical standpoint. (A. 63.)

The standard of the Administrative Procedure Act applicable to the Longshoremen's and Harbor Workers' Com-

pensation Act requires that the finding of the Commissioner be set aside if unsupported by substantial evidence and that such determination shall take into consideration the whole record. (5 U. S. C. 1009(g).)

This Court has described the function of the courts under that provision in *Universal Camera Co.* v. *National Labor Relations Board,* 340 U. S. 474 (1951), p. 490:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of labor board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibilities for assuring that the Board keeps within reasonable grounds. * * *"

And further at page 488:

> "Congress has made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscienciously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

Respondents respectfully request that as the Court of Appeals did not reach the issue of substantiality, that this Court set aside the finding of causal relationship as not being supported by substantial evidence and thus insure that the standard of the statute be honored and the function of the courts of review be fulfilled.

The purpose and intention of the statute requiring substantial evidence is clear. Without enforcement by this court, it is a nullity.

CONCLUSION.

The respondents respectfully request that this Court affirm the judgment of the Court of Appeals for the reason that the Deputy Commissioner should not have entertained the second claim because it was barred by res judicata and because it was barred by Section 33(g) of the Longshoremen's and Harbor Workers' Compensation Act by virtue of the compromise of a third party action without the approval of the employer and for the further reason that the finding of a causal relationship between the decedent's work and a subsequent fatal fall in his home is a finding that is not supported by substantial evidence as required by law.

Respectfully submitted,

MARK A. BRAUN,
39 South La Salle Street,
Chicago, Illinois 60603,
Attorney for Respondents.

KLOHR, BRAUN, LYNCH & SMITH,
THOMAS P. SMITH,
39 South La Salle Street,
Chicago, Illinois 60603,
Of Counsel.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 26 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 59

AGNES M. BANKS, WIDOW OF JOHN J. BANKS, DECEASED, AND REPRESENTATIVE OF JAMES M. BANKS, JANICE BANKS, AND CATHERINE M. BANKS, MINOR CHILDREN OF JOHN J. BANKS, DECEASED,
Petitioners,

AND

R. C. ENOS, DEPUTY COMMISSIONER,

vs.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC. AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

MARK A. BRAUN,
39 South La Salle Street,
Chicago, Illinois 60603,
Attorney for Respondents.

KLOHR, BRAUN, LYNCH & SMITH,
THOMAS P. SMITH,
39 South La Salle Street,
Chicago, Illinois 60603,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 59.

AGNES M. BANKS, WIDOW OF JOHN J. BANKS, DECEASED, AND REPRESENTATIVE OF JAMES M. BANKS, JANICE BANKS, AND CATHERINE M. BANKS, MINOR CHILDREN OF JOHN J. BANKS, DECEASED,
Petitioners,

AND

R. C. ENOS, DEPUTY COMMISSIONER,

vs.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC. AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

Now comes Chicago Grain Trimmers Association, Inc. and New Amsterdam Casualty Company and respectfully pray the Court to grant a rehearing for the reason that the Court has overlooked a basic issue and has applied a double standard to the interpretation of the two sections involved.

In classifying the second claim as a Section 22 petition for review, the Court ignored all designations or labels that the second proceeding was a new claim, but interpreted the nature of that second proceeding. However, in rejecting the applicability of the sanctions of Section 33(g), the Court accepted as sacrosanct the label "remittitur." This in spite of an uncontradicted record that this "remittitur" was not the product of a judicial determination of damages.

After the Deputy Commissioner denied the first claim for compensation in 1961 with a finding that the death of the employee from fatal injuries sustained in his home was not related to his employment, a second claim was filed. It was labeled a new claim, it was given a new case number and trial was permitted by the Deputy Commissioner only for the reason it was a new claim (A-21). This second filing was treated as a new claim before the Deputy Commissioner, the District Court on appeal and in the Court of Appeals up to the time of rehearing. This Court's opinion holds that the label on the second action is irrelevant (fn. 8, Page 6) and that upon interpretation, the second claim in reality was a petition to review because of mistake as permitted under Section 22.

If the label "new claim" is irrelevant in re Section 22, then also the label "remittitur" is irrelevant in re Section 33(g).

This Court's acceptance of the word remittitur as being synonymous with judicial determination, without regard to whether there was actually a judicial determination or evaluation, constitutes the application of a double standard in the interpretation of the provisions of the statute.

The record before this Court is uncontradicted that the motion for a new trial after the $30,000 verdict against the third party did not raise the issue of the propriety of damages. The motion specified error going to the liability issue

only (A-97, 98, 99, 100). The question of damages was not before the Court. Neither petitioners' brief nor their oral argument before this Court contained a single word of rebuttal to the proof that the issue of damages was not actually before the Court at the time the so-called "remittitur" order was entered. Petitioners have argued only there was an order labeled remittitur. They have never written or argued that there was, in fact, a judicial determination of damages. The opinion of the Court is also without reference to evidence of an actual evaluation of damages.

The opinion in this regard relies solely on the 1936 New York case of *Gallagher* v. *Carol Construction,* 5 N. E. 2d 63, 64. There the Court specifically pointed out that the request for a new trial was made *only* because of the allegation that the verdict was *excessive.* The case, therefore, is without persuasive value here as this record is uncontradicted that the propriety of damages was not a part of the new trial motion.

Subsequent to the *Gallagher* case, the New York Courts have looked at the nature of the disposition of a third party action rather than at the label placed on such disposition and have consistently refused to permit further compensation proceedings when the third party disposition was by something other than an actual judicial determination regardless of whether the disposition carried a false but judicial sounding label, such as directed verdict, remittitur or judgment. (*Bogdanoff* v. *Halper,* 52 N. Y. S. 2d 625, 626 (1944); *Commissioners of Taxation and Finance* v. *General Electric Company,* 105 N. Y. S. 2d 929 (1959); *Cristiano* v. *Ninfa's Restaurant,* 139 N. Y. S. 2d 543 (1955); *Kirby* v. *Bloomingdale Brothers,* 10 N. Y. S. 2d 443 Affirmed, 281 N. Y. 856, 24 N. E. 2d 499 (1939); *Duffy* v. *Fuller,* 250 N. Y. S. 2d 108 (1964). The Courts of Appeal

subsequent to Gallagher have also required actual proof of a judicial determination rather than a label to overcome the sanction of Section 33(g). (*Marlin* v. *Cardillo*, 95 F. 2d 112 (C. A. D. C. 1938); *Utilities Insurance Company* v. *McBride*, 315 F. 2d 553, 556 (C. A. 10, 1963).

This Court's opinion now invites litigants to participate in a subterfuge of one form or another to cover up a compromise settlement by giving it a label of judgment or remittitur. The Courts of the State of New York do not tolerate such practice. Should a lesser standard apply in the Federal System?

Because this Court's decision in *Seas Shipping Company* v. *Sierecki*, 328 U. S. 85, now grants longshoremen a right of action for unseaworthiness against a third party, the Court's opinion here invites wholesale avoidance of Section 33(g) as virtually every injury to a longshoreman gives rise to an action for damage because of unseaworthiness against a third party, someone other than the employer.

Respondents respectfully suggest that this Court has ignored or overlooked the basic argument that nowhere in all of the proceedings under this second claim has any administrative body or any court considered the contention that the "remittitur" was, in fact, by agreement, that it was a compromise, and it was not a judicial determination. Commissioner Enos said he would not consider the defense because this was a legal issue (A-4). The District Court did not even hear oral argument, but simply affirmed the findings of fact of the Deputy Commissioner. The Court of Appeals did not reach the issue. Nowhere in this Court's opinion is there any mention of what evidence establishes that a judicial determination occurred. The

opinion holds only that as the order carried the label "remittitur", there was a determination and, therefore, not a compromise. Respondents have always agreed that if there is a judicial determination of damages there is no compromise. However, to label an order "remittitur" does not make it a judicial determination.

The double standard applied grants petitioners two hearings and deprives respondents of even a single consideration of the basic contention that there was never a judicial determination of damages.

If it is not the desire or the policy of this Court to examine a record on this type of issue as has been indicated, we respectfully ask that the matter be remanded so that at least on one occasion in the Federal Administrative System or the Federal Judicial System, the respondents may have a hearing on whether there was a judicial determination of damages on the motion for a new trial.

The opinion cites with approval *Bell* v. *O'Hearne,* C. A. 4, 284 F. 2d 781 (1960). There the jury returned a verdict of $6,500. To avoid appeal costs the plaintiff accepted $5,000. That acceptance was held not a compromise only because the full verdict amount of $6,500 was credited to the employer. Application of that case requires remandment here with directions that the employer be credited with the $30,000 jury verdict.

A remandment for application of the O'Hearne rule or to examine the record for any evidence of a judicial determination of damages will not contravene the Court's expressed desire to terminate litigation in this case as this Court's decision in re Section 22 guarantees that litigation will be interminable in this case and in every case where compensation is awarded. Now, this case can be retried

just as soon as the first $54.00 weekly payment is made and it can be tried again, and again, and again within one year after any payment of compensation. All that is required is the simple allegation that the Deputy Commissioner should change his mind, that he made a mistake.

The opportunity for indefinite retrial however is a unilateral right of the employer. The employee's time to seek retrial expires in one year if he loses as there are no weekly payments to continually extend the time in which to suggest that a mistake may have been made.

This practical result of the Court's decision regarding Section 22 in and of itself demonstrates that the initial structure of the Act intended Section 21 to afford an opportunity to retry or appeal the liability issues and that the purpose of Section 22 is as it has been used to this date, to consider the disability issue only. If Section 22 is permitted to reopen liability issues because of alleged mistake, the basic structure of the Act is denied and the fundamental purpose of the statute to achieve a prompt and final determination is destroyed.

Respondents, therefore, respectfully suggest that as equal justice requires a look behind the label "remittitur" as the Court looked behind the label "claim for compensation" that the Court also re-examine its decision regarding Section 22 and consider that as the amendment placing the word mistake in that section is not explained by the Congress or the Commission, it must be held that Congress did not intend to have injured employees or widows of deceased employees relitigate their cases interminably. Such right to engage in interminable litigation by one party only would be a harsh and incongruous result not to

be permitted in the interpretation of this statute. (*Voris* v. *Eikel*, 346 U. S. 328 (1953).)

Respectfully submitted,

MARK A. BRAUN,
39 South La Salle Street,
Chicago, Illinois 60603,
Attorney for Respondents.

KLOHR, BRAUN, LYNCH & SMITH,
THOMAS P. SMITH,
39 South La Salle Street,
Chicago, Illinois 60603,
Of Counsel.

CERTIFICATE.

I certify that this Petition is presented in good faith and not for delay.

MARK A. BRAUN.

SUPREME COURT OF THE UNITED STATES

No. 59.—October Term, 1967.

Agnes M. Banks, etc., Petitioner, *v.* Chicago Grain Trimmers Association, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 1, 1968.]

Mr. Justice Stewart delivered the opinion of the Court.

On January 30, 1961, shortly after returning home from work, the petitioner's husband suffered a fall that resulted in his death on February 12. On February 20, 1961, the petitioner on behalf of herself and her three minor children filed a claim against her husband's employer, the respondent, for compensation death benefits under the Longshoremen's and Harbor Workers' Compensation Act.[1] 33 U. S. C. §§ 901–950. The petitioner alleged that her husband's fall on January 30 had resulted from a work-connected injury suffered on January 26. A hearing was held before a Department of Labor Deputy Commissioner; and on June 8, 1961, the Deputy Commissioner rejected the petitioner's claim for failure to establish that her husband's death had resulted from a work-connected injury.[2] The petitioner did not bring an action in District Court to set aside the Deputy Commissioner's ruling. 33 U. S. C. § 921. Sometime after the Deputy Commissioner's decision, the petitioner discovered an eyewitness to a work-connected injury suf-

[1] The petitioner's husband had worked for the respondent as a grain trimmer since 1934. Grain trimmers load and unload grain-carrying barges and vessels.

[2] It is not entirely clear from the Deputy Commissioner's decision whether it rested on insufficient proof of a causal nexus between the January 26 injury and the January 30 fall or on insufficient proof that the alleged January 26 injury in fact occurred at all.

fered by her husband on January 30, the same day as his fall at home. On August 22, 1961, the petitioner filed a second compensation action against the respondent—this time alleging that the fall resulted from an injury suffered on January 30.

On September 8, 1961, the petitioner began a wrongful-death action in the Northern District of Illinois against a third party, the Norris Grain Company, alleging that her husband's fall resulted from the same January 30 injury. On May 3, 1963, a jury rendered a verdict of $30,000 for the petitioner in that lawsuit. The grain company moved for a new trial, and the trial judge ruled that the motion would be granted unless the petitioner consented to a remittitur of $11,000. On May 16, 1963, without consulting the respondent, the petitioner accepted the remittitur. Judgment was entered for $19,000.

On August 29, 1963, a hearing on the petitioner's second compensation action commenced. On January 27, 1964, the Deputy Commissioner entered findings of fact and an award for the petitioner. The respondent brought an action in District Court to set the award aside. The District Court affirmed, but the Court of Appeals reversed. 369 F. 2d 344. We granted certiorari to consider questions concerning the administration of the Longshoremen's and Harbor Workers' Compensation Act. 389 U. S. 813.

The Court of Appeals held that the petitioner's second compensation action was barred by the doctrine of res judicata. The petitioner contends that that doctrine is displaced in this case by the operation of § 22 of the Act,[2] which provides:

> "Upon his own initiative, or upon the application of any party in interest, on the ground of a change

[2] The petitioner also contends that (1) the doctrine of res judicata does not apply to administrative compensation cases generally, and

> in conditions or *because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may,* at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or *at any time prior to one year after the rejection of a claim, review a compensation case* in accordance with the procedure prescribed [for original claims], *and* in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or *award compensation.*" 33 U. S. C. § 922. (Emphasis added.)

The petitioner asserts that her second compensation action came under § 22 because it challenged a "determination of fact by the deputy commissioner" in her original compensation action—namely, the finding that her husband's fall did not result from a work-connected injury. The respondent argues that "a mistake in a determination of fact" in § 22 refers only to clerical errors and matters concerning an employee's disability, not to matters concerning an employer's liability. Conceding that nothing in the statutory language supports this reading, the respondent contends that the legislative history reveals Congress' limited purpose.[4]

---

(2) if res judicata does apply, her second action did not arise out of the same cause of action as did her first. We do not reach these contentions.

[4] The respondent does not rely on either of the reasons given by the Court of Appeals for holding § 22 inapplicable: (1) that the Deputy Commissioner was not aware of Banks' January 30 injury until more than one year after the petitioner's original claim was rejected, and (2) that the petitioner's second compensation action did not dispute the original findings of fact of the Deputy Commissioner. The petitioner filed her second compensation action within a few months after the original claim was rejected; it is

Section 22 was first enacted as part of the original Longshoremen's and Harbor Workers' Compensation Act in 1927. 44 Stat. 1424, 1437. At that time the section provided for review by the Deputy Commissioner only on the ground of a "change in conditions." The Deputy Commissioner was authorized by the section to "terminate, continue, increase, or decrease" the original compensation award; review was permitted only "during the term of an award."

From 1930 to 1933, the United States Employees' Compensation Commission, which was charged with administering the Act, recommended in its annual reports that § 22 be amended to permit review by the Deputy Commissioner at any time. 14th Ann. Rep. of the United States Employees' Compensation Commission (hereafter USECC) 75 (1930); 15th Ann. Rep. USECC 77 (1931); 16th Ann. Rep. USECC 49 (1932); 17th Ann. Rep. USECC 18 (1933).[5] In 1934 Congress, while not

---

irrelevant that the hearing occurred more than a year later. *Candado Stevedoring Corp.* v. *Willard*, 185 F. 2d 232. The question of the causation of the petitioner's husband's fall is obviously one of fact, cf. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504; the case cited by the Court of Appeals, *Flamm* v. *Hughes*, 329 F. 2d 378, is utterly inapposite since it dealt with the possibility of litigating a question of constitutional law in a § 22 proceeding.

[5] In 1928 the Commission recommended that "an amendment be adopted which will give deputy commissioners the continuing authority to reopen cases that is usually conferred upon compensation boards" because "situations are continually arising in which the action taken by a deputy commissioner in correcting an error in an order may give rise to controversy and result in a failure to do justice to either the employer or the employee." 12th Ann. Rep. USECC 40 (1928). It is not at all clear just what the Commission thus meant to recommend. In any event this recommendation was not repeated in later annual reports, and there is no evidence that Congress at any time sought to adopt it. (Compare the committee reports to the 1934 amendment to § 22, which contain specific references to the 17th Ann. Rep. USECC (1933). S. Rep. No. 625, 73d

adopting the recommendation entirely, responded by amending § 22 to permit review "any time prior to one year after the date of the last payment of compensation." [6] 48 Stat. 807. At the same time Congress added a second ground for review by the Deputy Commissioner: "a mistake in a determination of fact." The purpose of this amendment was to "broaden the grounds on which a deputy commissioner can modify an award" by allowing modification where "a mistake in a determination of fact makes such modification desirable in order to render justice under the act." S. Rep. No. 625, 73d Cong., 2d Sess., 3–4 (1934); H. R. Rep. No. 1244, 73d Cong., 2d Sess., 4 (1934).

In its annual reports for 1934–1936, the Compensation Commission recommended that § 22 be further amended to apply in cases where the original compensation claim is rejected by the Deputy Commissioner. 18th Ann. Rep. USECC 38 (1934); 19th Ann. Rep. USECC 49 (1935); 20th Ann. Rep. USECC 52 (1936). Congress responded in 1938 by amending § 22 to permit review by the Deputy Commissioner "at any time prior to one year after the rejection of a claim" and to allow the Deputy Commissioner after such review to "award compensation." 52 Stat. 1167. The purpose of this amendment was to extend "the enlarged authority therein (1934 amendment) provided to cases in which the action of the deputy commissioner has been a rejection of the claim." S. Rep. No. 1988, 75th Cong., 3d Sess., 8 (1938); H. R. Rep. No. 1945, 75th Cong., 3d Sess., 8 (1938).

We find nothing in this legislative history to support the respondent's argument that a "determination of fact"

Cong., 2d Sess., 3 (1934); H. R. Rep. No. 1244, 73d Cong., 2d Sess., 4 (1934).)

[6] Congress also added authority for the Deputy Commissioner to "reinstate" compensation as well as to terminate, continue, increase, or decrease it.

means only some determinations of fact and not others. The respondent points out that the recommendations of the Compensation Commission prior to the 1934 amendment referred to analogous state laws; but those recommendations dealt with the time period in which review was to be available, not with the grounds for review. The respondent has referred us to no decision, state or federal, holding that a statute permitting review of determinations of fact is limited to issues relating to disability. In the absence of persuasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning,[7] and we hold that the petitioner's second compensation action, filed a few months after the rejection of her original claim, came within the scope of § 22.[8]

The respondent raised two other issues in the Court of Appeals, which that court found unnecessary to reach. These issues have been fully briefed and argued in this Court; and in order to bring this litigation to a close, we dispose of them here.

Section 33 of the Longshoremen's and Harbor Workers' Compensation Act permits an individual entitled to compensation to sue a third party for damages. 33 U. S. C. § 933 (a). If no such suit is brought and compensation is accepted from the employer under an award, the rights

---

[7] It is true that the statute as enacted in 1927, permitting review only "on the ground of a change in conditions," might have supported a distinction between issues of disability and liability. But after the 1934 and 1938 amendments, permitting review of "a determination of fact" and authorizing the Deputy Commissioner to "award compensation" even where the original claim is rejected, the asserted distinction can draw no support from the statutory language.

[8] It is irrelevant for purposes of § 22 that the petitioner labeled her second action a claim for compensation rather than an application for review so long as the action in fact comes within the scope of the section. *Candado Stevedoring Corp. v. Willard*, 185 F. 2d 232.

of the employee against third parties are assigned to the employer. 33 U. S. C. § 933 (b) and (d). If, as in this case, a suit is brought against a third party, the employer is liable in compensation only to the extent that allowable compensation benefits exceed the recovery from the third party. 33 U. S. C. § 933 (f). Section 33 (g) of the Act further provides:

> "If compromise with such third person is made by the person entitled to compensation . . . of an amount less than the compensation to which such person or representative would be entitled under this chapter, the employer shall be liable for compensation . . . only if such compromise is made with his written approval." 33 U. S. C. § 933 (g).

The respondent contends that the petitioner's acceptance of the judicially ordered remittitur of $11,000 in her third-party lawsuit was a "compromise" within the meaning of § 33 (g). We disagree.

The Longshoremen's and Harbor Workers' Compensation Act was modeled on the New York employees' compensation statute. *Lawson* v. *Suwannee S. S. Co.*, 336 U. S. 198, 205; H. R. Rep. No. 1190, 69th Cong., 1st Sess., 2 (1926). Under the analogous provision of that Act, the New York Court of Appeals has held that a remittitur is not a compromise.

> "Plaintiff's stipulation consenting to take that portion of the verdict judicially determined as being not excessive, does not fall within any recognized meaning of the word 'compromise.'" *Gallagher* v. *Carol Construction Co.*, 272 N. Y. 127, 129.

An order of remittitur is a judicial determination of recoverable damages; it is not an agreement among the parties involving mutual concessions. Section 33 (g) protects the employer against his employee's accepting too little for his cause of action against a third party.

That danger is not present when damages are determined, not by negotiations between the employee and the third party, but rather by the independent evaluation of a trial judge. Cf. *Bell* v. *O'Hearne*, 284 F. 2d 777.

Finally, the respondent attacks the Deputy Commissioner's finding of fact that there was a causal connection between the work-connected injury suffered by the petitioner's husband on January 30 and his fall at home some two hours later. The Deputy Commissioner's finding must be affirmed if supported by substantial evidence on the record considered as a whole. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504. The District Court held that the Deputy Commissioner's finding was supported by substantial evidence, and we agree. While some of the testimony of the petitioner's medical expert was arguably inconsistent with other parts of his testimony, it was within the province of the Deputy Commissioner to credit part of the witness' testimony without accepting it all.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.